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Oct. 5. 1878

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1,050.

MARY C. GORDON, WIFE OF WILLIAM ALEXANDER GORDON, APPELLANT,

vs.

JAMES H. GILFOIL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED 30th DECEMBER, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 1,050.

MARY C. GORDON, WIFE OF WILLIAM ALEXANDER GORDON, APPELLANT,

vs.

JAMES H. GILFOIL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED 20TH DECEMBER, 1878.

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1 United States of America, Circuit Court of the United States, in and for the Fifth Circuit and District of Louisiana.

MARY C. GORDON
vs.
JAMES H. GILFOIL. } No. 7956.

Petition.—Filed October 19th, 1876.

To the Honorable the Judges of the United States Court for the Fifth Circuit and District of Louisiana:

The petition of Mary Cartwright Gordon, wife of William Alexander Gordon, citizen of the State of Mississippi, herein duly authorized and assisted by her said husband, who joins her for that purpose, respectfully shows:

That she is the holder and owner of four promissory notes, dated New Orleans, January 17th, 1867, payable respectively on the 1st January, 1868, and 1st January, 1869. The two first, due in 1868, are for the sums of seventeen hundred and fifty dollars ($1750) and five hundred and twenty-seven dollars ($527); the remaining two, due 1st January, 1869, are for seventeen hundred and fifty
2 dollars ($1750) and five hundred dollars ($500),—all bearing interest at the rate of eight per cent. per annum from the 1st January, 1866, until paid; which notes are signed by Patrick Gilfoil, now deceased, but lately a citizen of Madison parish, State of Louisiana.

Petitioner shows that Patrick Gilfoil, the maker of the said notes, has departed this life, leaving as his only heir a son, James H. Gilfoil, a citizen of the parish of Madison, in the State of Louisiana, who owns and claims all the property left by the deceased.

Your petitioner now avers that in order to secure the full and punctual payment of the four above-described notes, that the same were paraphed "Ne Varietur," in order to identify them with a certain act of mortgage, passed before P. C. Cuvellier, late a notary public of the city of New Orleans, under date of the 17th January, 1867, a certified copy of which is attached hereto as exhibit A, together with the said mortgage notes, marked B, C, D, and E, all o which are annexed and made part of this petition.

Shows that the following-described property is especially
3 hypothecated and pledged by said mortgage, to wit: a certain tract of land established as a cotton plantation, situated in the parish of Madison, in this State, consisting of the southeast quarter of section 58, in township 18, range 13 east, in the district of land north of Red River, Louisiana, containing one hundred and sixty acres, and bounded north and west by the lands of W. R. Peet, and south and east by lands of W. F. Bledsoe, together with all the buildings and improvements on the said land.

Petitioner shows that she obtained an order of seizure and sale on the above-described mortgage notes, in the suit styled Mary Cartwright, wife of W. Alexander Gordon, *vs.* Patrick Gilfoil, No. 572,

N. S., on the docket of the District Court for the parish of Madison, thirteenth judicial district of the State of Louisiana, which order she attempted to execute, and failed, in consequence of the sheriff of said parish not performing his duty; that this order was issued on the 13th day of February, 1869, and has never been amended; that since the institution of said suit your petitioner has removed
4 from the State of Louisiana and into the State of Mississippi, and that her interests in this suit will be more fully protected in the court of the United States, which now has jurisdiction, than in the State courts.

Petitioner avers that the said notes are due and unpaid, although she has made amicable demand therefor, and that the said James H. Gilfoil, as sole heir of his deceased father, and who has taken possession of the entire estate, thereby making himself responsible for the debts due by said estate, is justly and truly indebted to your petitioner in the sum of forty-five hundred and twenty-seven dollars, with interest from January 1st, 1866.

Wherefore, premises and annexed exhibits, marked A, B, C, D, and E, hereto attached, being duly considered, petitioner prays that James H. Gilfoil be cited to appear and answer this petition, and, after all due proceedings, that petitioner have judgment in her favor, and against James H. Gilfoil, for the said sum of forty-five hundred and seventy-seven dollars, with interest as aforesaid, and all costs of court, the whole to be paid, with mortgage lien and privilege,
5 out of the property herein described, or the proceeds thereof, and for all general and equitable relief.

(Signed) C. T. BEMISS, *Att'y.*

Exhibit "A."—Annexed to and Filed with Petition October 19th, 1876.

STATE OF LOUISIANA,
City of New Orleans.

Before me, Pierre Charles Cuvellier, notary public, in and for the parish of Orleans and city of New Orleans, State of Louisiana aforesaid, duly commissioned and sworn, and in the presence of witnesses hereinafter named and undersigned, personally came and appeared Patrick Gilfoil, of the parish of Madison, in this State, who declared and acknowledged that he is justly and truly indebted unto Messrs. Gordon & Castillo, late a commercial firm of this city, now in liquidation, composed of William Alexander Gordon, Julio E. Denis, and of Charles Arthur Castillo, now deceased, in the full amount and sum of four thousand five hundred and twenty seven dollars in
6 account current, and in liquidation of said indebtedness, in order to facilitate the negotiation and collection thereof, the said P. Gilfoil has made and subscribed his own order, and has endorsed four promissory notes, dated this day, all bearing interest at the rate of eight per cent. per annum from the first day of January, eighteen hundred and sixty-six, until paid, for the sums respectively, made payable at the Louisiana National Bank of New Orleans, to

wit, one for the sum of seventeen hundred and fifty dollars on the first day of January, (1868) eighteen hundred and sixty-eight, and three for a like sum of seventeen hundred and fifty dollars on the first day of January, (1869) eighteen hundred and sixty-nine; one for the sum of five hundred and twenty-seven dollars on the first day of January, eighteen hundred and sixty-eight; one for the sum of five hundred dollars on the first day of January, (1869) eighteen hundred and sixty-nine, which said four notes being exhibited before me, said notary, were by me paraphed and countersigned *Ne Varietur*, in order to identify them herewith, and delivered to William Alexan-
7 der Gordon, one of the members of said firm of W. A. Gordon & Castillo, here present; and in case it should become necessary to institute judicial proceedings for the recovery of the amount of said notes, or any part thereof, the said P. Gilfoil binds himself and his heirs to pay the fees of the attorney at law who may be employed for that purpose, whose fees are fixed at five per cent. on the amount sued for.

Now, therefore, in order to secure the full and punctual payment of the said notes at maturity, together with all interest accrued and to accrue thereon, and all costs, including attorney's fees aforesaid, the said Patrick Gilfoil declares that he does hereby specially mortgage and affect in favor of the said W. A. Gordon & Castillo, and to enure to the use and benefit of any and all future holder or holders of the said notes or any thereof, which mortgage is hereby accepted for the said firm and others by the said William Alexander Gordon, the following-described property, to wit: A certain tract of land established and cultivated as a cotton plantation, situated, lying, and being in the parish of Madison, in this State, consisting of the
8 southeast quarter of section fifty-eight (58), in township 18, range 13 east, in district of lands north of Red River, Louisiana, containing one hundred and sixty acres, and bounded north and west by lands of W. R. Peek, and south and east by lands of Mr. W. F. Bledsoe; together, also, with all the buildings and improvements on said land, the stock, implements, and appurtenances thereto belonging or appertaining; which said property the said mortgager covenants and warrants to belong to him by good and lawful title, and to be free of all mortgages or incumbrances, with which declaration the said William A. Gordon, for his said firm, acknowledges himself satisfied, dispensing with the recital of titles, and also the certificate required by article 3328 of the Civil Code of this State, and holding me, notary, harmless in the premises. It is understood and agreed that the present act shall bear confession of judgment in favor of the said mortgagees or any holder or holders of the said notes, so that in case of non-payment thereof the said property may be seized and sold to the highest bidder for cash under
9 executory process issued by any competent court, the said mortgager binding himself not to alienate, deteriorate, nor incumber the said property to the prejudice of the mortgagee being granted. The mortgager declares that he is a widower, but neither

tutor nor curator to any minor, interdicted or absent persons, except as natural tutor of his minor son, James H. Gilfoil; and he binds himself to have a copy of the present act duly recorded in the current book of conventional mortgages in the office of the recorder of the said parish of Madison, and to return the said copy, with a certificate of the said recorder thereon endorsed or thereto attached showing said record to have been made, and stating what mortgage, if any, other than the one herein granted stands in his name on said property, said obligation to be fulfilled within a delay of sixty days from the date hereof. United States internal-revenue stamps are hereon affixed and cancelled to the amount of five dollars.

Thus done and passed in my office, at the city of New Orleans, in the presence of Edward Allen and Placide Bievenue, witnesses of lawful age and domiciliated in this city, who hereunto sign their names, together with the said parties, and me, said notary, on this seventeenth day of January, in the year of our Lord one thousand eight hundred and sixty-seven.

Orignal signed: W. ALEX. GORDON.
E. ALLEN. P. BIENVENUE. P. GILFOIL.
P. CHAS. CUVELLIER, *Not. Pub.*

A true copy. New Orleans, January 18, 1867.
(Signed) P. CHAS. CUVELLIER, *Not. Pub.*

Recorded this 1st day of February, A. D. 1868.
(Signed) L. M. BOYCE, *Recorder.*

STATE OF LOUISIANA,
Parish of Madison.

I, L. M. Boyce, recorder in and for the parish and State aforesaid, do hereby certify that the foregoing five pages contain a correct copy of the mortgage, as remains of record in my office.

Witness my signature and official seal, this 4th day of Jan'y, 1868.
(Signed) L. M. BOYCE, *Recorder.*

11 *Exhibit "B."—Annexed to and Filed with Petition October 19th, 1876.*

$1,750.00. NEW ORLEANS, *January 17th*, 1867.

On the first day of January, eighteen hundred and sixty-eight, I promise to pay to the order of myself, at Louisiana National Bank of New Orleans, seventeen hundred and fifty dollars, with interest at the rate of eight per cent. per annum from the first day of January, eighteen hundred and sixty-six, until paid. Value received.
(Signed) P. GILFOIL.

Endorsed: P. Gilfoil.

[Written across the face:] *Ne variatur*, as per act of mortgage duly stamped. New Orleans, January 17th, 1867.
P. CHS. CUVELLIER, *Not. Pub.*

Exhibit "C."—Annexed to and Filed with Petition Oct. 19th, 1876.

$527.00. NEW ORLEANS, *January 17th*, 1867.

On the first day of January, eighteen hundred and sixty-eight, I promise to pay to the order of myself, at the Louisiana National Bank of New Orleans, five hundred and twenty-seven dollars, with interest at the rate of eight per cent. per annum from the first day of January, eighteen hundred and sixty-six, until paid. Value received.

(Signed) P. GILFOIL.

12 Endorsed: P. Gilfoil.

[Written across the face:] *Ne varietur*, as per act of mortgage duly stamped. New Orleans, January 17th, 1867.

P. CHS. CUVELLIER, *Not. Pub.*

Exhibit "D."—Annexed to and Filed with Petition October 19th, 1876.

$1,750.00. NEW ORLEANS, *January 17th*, 1867.

On the first day of January, eighteen hundred and sixty-nine, I promise to pay to the order of myself, at the Louisiana National Bank of New Orleans, seventeen hundred and fifty dollars, with interest at the rate of eight per cent. per annum from the first day of January, eighteen hundred and sixty-six, until paid. Value received.

(Signed) P. GILFOIL.

Endorsed: P. Gilfoil.

[Written across the face:] *Ne varietur*, as per act of mortgage duly stamped. New Orleans, January 17th, 1867.

P. CHS. CUVELLIER, *Not. Pub.*

Exhibit "E."—Annexed to and Filed with Petition Oct. 19th, 1876.

$500.00. NEW ORLEANS, *January 17th*, 1867.

On the first day of January, eighteen hundred and sixty-nine, I promise to pay to the order of myself, at the Louisiana National Bank of New Orleans, five hundred dollars, with interest at the rate of eight per cent. per annum from the first day of January,

13 eighteen hundred and sixty-six, until paid. Value received.

(Signed) P. GILFOIL.

Endorsed: P. Gilfoil.

[Written across the face:] *Ne varietur*, as per act of mortgage duly stamped. New Orleans, January 17th, 1867.

P. CHS. CUVELLIER, *Not. Pub.*

Citation.—Issued October 19th, 1876.

The President of the United States of America, to the Marshal of the District of Louisiana, greeting:

MARY C. GORDON *vs.* JAMES H. GILFOIL. } No. 7956.

You are hereby commanded to summon James H. Gilfoil, a citi-

zen of the State of Louisiana, to comply with the demand of Mary Cartwright, wife of William Alexander Gordon, and a citizen of the State of Mississippi, contained in the petition, of which a copy accompanies this citation, or to deliver his answer to the same in the office of the clerk of the Circuit Court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans,
14 in ten days after service hereof, or judgment will be rendered against him by default, which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans, the place where the court is held; and that you make due return hereof on the first Monday of November, 1876.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at the city
[SEAL.] of New Orleans, this 19th day of October, A. D. one thousand eight hundred and seventy-six, and of the Independence of the United States of America the 101st year.

(Signed) F. B. VINOT, *D'y Clerk.*

Marshal's Return.

Received October 19th, 1876, by the U. S. marshal, and on the 25th day of October, 1876, served a copy hereof, with accompanying petition, on James H. Gilfoil, within named, by handing the same to him in person, at his domicile, in the parish of Madison, 440 miles from New Orleans.

15 (Signed) J. R. G. PITKIN, *U. S. Marshal.*
By JOHN FAHY, *D'y U. S. Marshal.*

Exception.—Filed December 14th, 1876.

MARY C. GORDON
vs.
JAMES H. GILFOIL. } U. S. Circuit Court.—No. 7956.

To the Honorable the Judges of the Circuit Court of the United States for the District of Louisiana, in the Fifth Circuit:

And now into court comes the defendant, James H. Gilfoil, and makes exception to the petition of plaintiff, viz.: 1st. That the said petition discloses no cause of action against this respondent. 2. That this court is without jurisdiction, for the reason that said plaintiff, having elected to sue in the Court of the State of Louisiana, the 13th Dist. Court, in and for the parish of Madison, and jurisdiction of this cause has already vested in the said State Court. 3. That the obligations sued on are prescribed by the lapse of more than five years.

Wherefore respondent prays that these exceptions be main-
16 tained and this suit dismissed at plaintiff's costs; and for general relief.

(Signed) SAM'L R. & C. L. WALKER.
Def't's Att'ys.

Motion and Order: Exception assigned for Trial.—Extract from the Minutes, November Term, 1876.

New Orleans, Saturday, January 27th, 1877. Court met pursuant to adjournment. Present: Hon. E. C. Billings, District Judge.

MARY C. GORDON
vs. } No. 7956.
JAS. H. GILFOIL.

On motion of C. T. Bemiss, of counsel for plaintiff, Ordered, That the exception herein be assigned for trial on 3d February, 1877, at 11 A. M., and that exceptor be notified.

Order on Exception.—Extract from the Minutes of Febr'y 3d, 1877.

MARY C. GORDON
vs. } No. 7956.
JAS. H. GILFOIL.

The exception in this cause came up for trial. C. T. Be-
17 miss, for plaintiff; S. R. & C. L. Walker, for defendant. And after hearing the pleadings and argument, it is ordered by the court, that the plea of prescription be referred to the merits, and that the plaintiff be allowed to amend his petition by setting up the facts upon which she relies to interrupt prescription.

Supplemental Petition and Order.—Filed February 8th, 1877.

To the Honorable the Judges of the United States Circuit Court for the Fifth Circuit and District of Louisiana:

MARY C. GORDON
vs. } No. 7956.
JAMES H. GILFOIL.

The supplemental and amended petition of Mary Cartwright Gordon, wife of William Alexander Gordon, citizen of the State of Mississippi, herein duly authorized and assisted by her said husband, who joins her for that purpose, respectfully represents:

That she herein reiterates and affirms the facts and allegations set forth in her original petition, and makes them a part hereof. Shows that the legal proceedings taken by her in her attempt to en-
18 force her claim by order of seizure and sale in suit No. 572 N. S., on the docket of the District Court for the parish of Madison, in the thirteenth judicial district of the State of Louisiana, were sufficient and ample under the laws and jurisprudence of Louisiana to interrupt and suspend prescription on the notes sued upon herein.

Shows that under the laws of Louisiana an heir who takes possession of the property of an estate becomes bound for the debts of the deceased, and that James H. Gilfoil, defendant herein, has taken possession of the estate and property of Patrick Gilfoil, his deceased father.

Wherefore, premises and the order of this honorable court being considered, your petitioner prays for leave to file this supplemental petition, and that after due proceedings had that she have judgment as prayed for in her original petition, and for her costs, and all general and equitable relief. Respectfully submitted.

(Signed) C. T. BEMISS, *of Counsel.*

19 Order: Let this supplemental petition be filed as within prayed for, and according to law.

February 8th, 1878.

(Signed) EDWARD C. BILLINGS, *Judge.*

Entering Default on Original and Supplemental Petitions.—Extract from the Minutes of February 21, 1877.

MARY C. GORDON
vs.
JAMES H. GILFOIL. } No. 7956.

On motion of C. T. Bemiss, of counsel for plaintiff, and on showing to the court that the defendant has failed to answer the original and supplemental petitions, although duly cited, Ordered, That judgment by default be entered against him.

Motion and Order: Default set Aside.—Extract from the Minutes of February 24th, 1877.

MARY C. GORDON
vs.
JAMES H. GILFOIL. } No. 7956.

On motion of Samuel R. & C. L. Walker, of counsel for
20 defendant, and on suggesting to the court that the default herein entered on 21st February, 1877, was improvidently and irregularly taken—

It is ordered, That the judgment by default herein be set aside, with leave to defendant to file his answer.

Answer.—Filed February 2th, 1877.

MARY C. GORDON
vs.
JAMES H. GILFOIL. } U. S. Circuit Court. No. 7956.

To the Honorable the Judges of the Circuit Court of the United States for the Fifth Circuit and District of Louisiana:

And now into court comes James H. Gilfoil, who resides in the parish of Madison, in Louisiana, and for answer to the demand of Mrs. Mary C. Gordon, plaintiff herein, denies all and singular the allegations of her petition.

And, further answering, respondent specially denies that the said plaintiff is in any way the true and lawful owner of the four
21 promissory notes sued on, and avers that the said plaintiff is not in any way entitled to sue thereon.

And respondent specially avers, that the above-described mortgage notes were filed and sued upon in a certain suit or proceedings in the thirteenth District Court, holding sessions in and for the parish of Tensas, entitled Mary Cartwright, wife of William Alexander Gordon, *v.* Patrick Gilfoil, No. 572 N. S., on the docket of said District Court, and that the said notes were merged and extinguished in a judgment or order of seizure and sale, and cannot be again sued on, and that as said proceedings have never been discontinued, this honorable court is without jurisdiction in the premises.

Respondent further avers, that the said notes are prescribed, by the lapse of five years, as to any action against this respondent thereon.

Wherefore respondent prays that said plaintiff's demand be rejected, at her costs, and for general relief.

(Signed) SAM'L R. & C. L. WALKER,
Defdt's Att'ys.

22 *Supplemental and Amended Answer and Order.—Filed March 12th*, 1877.

MARY C. GORDON *vs.* JAMES H. GILFOIL. } United States Circuit Court. No. 7956.

To the Honorable the Judges of the Circuit Court of the United States for the Fifth Circuit and District of Louisiana:

This, the supplemental and amended answer of the defendant, James H. Gilfoil, filed by leave of court first sought and obtained, with respect represents: That your respondent here adopts and reiterates all the averments of his answer hereinbefore filed, and for further answer avers, that

Your respondent is the legal owner and possessor of an undivided half interest in and to the tract of land of one hundred and sixty (160) acres, viz.: The southeast quarter of section fifty-eight (58), in township eighteen (18) north, of range thirteen (13) east, in Madison parish, being the same described in plaintiff's petition.

That your respondent is the legal and beneficiary heir to, and is the legal possessor as administrator of, the remaining or other
23 one-half of said land, as coming into respondent's ownership and possession from the succession of respondent's deceased father, Patrick Gilfoil, who died about the month of September, 1872.

That at the date of the alleged mortgage and mortgage notes (17th January, 1867) the said Patrick Gilfoil was not the owner of more than one-half of said tract of land, for that the same was the joint property of Patrick Gilfoil and his wife, Mrs. Catherine Gilfoil, who died 13th April, 1866, the same having been acquired by the two, husband and wife, by purchase from one Joseph L. Hynes, by deed bearing date 19th April, 1848, duly recorded in the proper office in said parish.

That your respondent, as sole heir, inherited all the property of

his said deceased mother, and thereby became the owner and possessor of the undivided half of said tract of land belonging to his said deceased mother, free from any incumbrances which said Patrick Gilfoil may have assumed to place thereon.

24 That your respondent, as administrator and as sole beneficiary heir of said Patrick Gilfoil, deceased September, 1872, became the possessor, and is now and has had the possession of the undivided one-half of said tract of land belonging to the succession of his said deceased father.

And this defendant specially denies that he has in any way or manner taken such possession as would make respondent liable personally for any debt or mortgage claimed against said property, or any part of the succession of Patrick Gilfoil, or for any of the rents or revenues thereof.

Respondent further shows, that on the 9th February, 1869, the plaintiff, Mrs. Gordon, filed suit upon the same notes herein sued on, and petitioned for executory process on the said same notes, in a certain suit entitled Mrs. Mary C. Gordon *vs.* Patrick Gilfoil, No. 572, N.S., in the thirteenth District Court for the parish of Madison, and that on the 9th February, 1869, a judgment was rendered for the amount of said notes, as will more fully appear by duly certified copies of

25 said petition, marked "F," and of said judgment, marked "G," hereto annexed as part hereof, and that said notes were thereby merged, extinguished, and novated by and in said judgment; and that the jurisdiction of said executory proceedings or suit is still vested in said State Court, from which it has never been divested nor removed to this court by any process known to law.

Respondent further avers, that on the 15th January, 1872, the plaintiff, Mrs. Gordon, filed also in said thirteenth District Court for the parish of Madison a certain suit against Patrick Gilfoil for the possession of said land, the same herein in dispute, said proceedings being entitled "Mary C. Gordon *vs.* Patrick Gilfoil," No. 772 on the docket of said State Court, as will appear by the annexed duly certified copy of said petition, marked "H," here referred to for proof.

That on the 22d May, 1872, this defendant, intervening in said suit No. 772, filed a petition therein changing the character of said cause from a possessory to a petitory action, alleging substantially

26 the same facts as are in this answer set forth, as will more fully appear by the duly certified copy of said intervention, marked "M," hereto annexed for reference.

That on the 4th day of April, 1874, the plaintiff herein, Mrs. Gordon, filed an amended and supplemental petition in said suit No. 772, joining issue with the intervenor therein, this defendant, averring the same facts substantially alleged in this present cause, averring the intermeddling by and taking possession and personal liability of this defendant, &c., as will more fully appear by reference to a duly certified copy of her said supplemental petition, marked "O," and hereto annexed.

And this respondent further shows, that on the 24th May, 1874, this defendant, in response to said supplemental petition, filed an answer thereto, a duly certified copy of which, marked "R," is hereto annexed.

And that on the 4th April, 1874, the said Mrs. Gordon filed an answer to the said intervention of this respondent, James H. Gilfoil, as will more fully appear by a copy of plaintiff's said answer,
27 marked as exhibit "T," and herewith filed.

And that on the 21st November, 1874, respondent filed in said suit No. 772 the plea of prescription by way of peremptory exception, as will more fully appear by reference to a copy of said exception, marked exhibit "V," and hereto annexed.

And that on the 23d November, 1874, there was rendered in said suit No. 772 a final judgment, a duly certified copy of which, marked "W," is herewith filed.

And that thereupon the said cause No. 772 was appealed to the Supreme Court of Louisiana, being No. 5665 on the docket thereof, and that on the 8th March, 1875, the said Supreme Court finally adjudicated upon the respective claims of both the said parties to said cause, rendering a decree in favor of the intervenor, now this respondent, against the said Mrs. Gordon, plaintiff, both in said suit No. 772 and this present cause, and upon the same issue of facts and pleadings, as will more fully appear by reference to a duly certified copy of said decree, herewith filed, being the decision published
28 on page 265 of the 27th volume of Annual Reports.

And that therefore the cause of action set up by plaintiff herein has been adjudicated upon, and that said proceedings are *res adjudicata*.

Wherefore respondent prays that said demand of plaintiff be rejected, and for judgment in defendant's favor, at plaintiff's costs, and for general relief.

(Signed) SAM'L R. & C. L. WALKER,
Defendant's Att'ys.

Order: Let this amended answer be filed.
March 12th, 1877.

(Signed) W. B. WOODS, *Judge.*

Exhibit "F."—Filed November 7th, 1877.

Referred to and made part of supplemental and amended answer.

MRS. MARY C. GORDON *vs.* PATRICK GILFOIL. } Thirteenth Judicial District Court, Parish of Madison. No. 572 "D."

To the Honorable the Judge of the Thirteenth Judicial Dis-
29 trict Court of the State of Louisiana, holding sessions of said court in and for the parish of Madison.

The petition of Mistress Mary Cartwright, wife of William Alexander Gordon, and who, with her said husband, reside in the city of

New Orleans, duly authorized and aided and assisted herein by her said husband, with respect represents:

That Patrick Gilfoil, who resides in the parish of Madison, is indebted unto your petitioner in the sum of four thousand five hundred and twenty-seven dollars, ($4,527,) together with interest upon said sum, at the rate of eight per cent. per annum, from the 1st day of January, A. D. 1866, till paid, and five per cent. upon the whole amount collectable for attorneys' fees, for this: the said Patrick Gilfoil executed his several promissory notes, in writing, all dated New Orleans, January 17th, 1867, all payable to his own order at the Louisiana Bank of New Orleans, and each bearing interest, at the rate of eight per cent. per annum, from the first day of January, 1866, till paid, for value received.

30 1st. For seventeen hundred and fifty dollars, ($1,750,) due and payable on the first day of January, 1868.

2d. For seventeen hundred and fifty dollars, ($1,750,) due and payable on the first day of January, 1869.

3d. For five hundred and twenty-seven dollars, ($527,) due and payable on first of January, 1869.

4th. For five hundred dollars, ($500,) due and payable on the first of January, 1869.

And having signed said notes "P. Gilfoil," and endorsed them in the same manner, he delivered them to William Alexander Gordon, acting, at the time of the execution of said notes, for the firm of W. A. Gordon & Castillo, to whom the debt evidenced by said notes had been originally due, and from said firm subsequently, in due course of commerce, your petitioner renewed the same, and thereby became the *bona-fide* holder and owner of the same in her own right.

Shows that at the same time and place the said Patrick Gilfoil, in order to secure the full and punctual payment of the said notes at maturity, together with all interest accrued and to accrue

31 thereon, with all costs, including the attorney's fees aforesaid, specially mortgaged—in favor of W. A. Gordon & Castillo, and to inure to the use and benefit of any and all future holder or holders of the said notes, or any one thereof—a certain tract of land, more particularly described in said act of mortgage; and in the same instrument bound himself, that in case it should become necessary to institute judicial proceedings for the recovery of the amount of said notes, or any part thereof, to pay the fees of the attorney at law who might be employed for that purpose, which fees are fixed at five per cent. upon the amount sued for. Said act of mortgage also contains the understanding and agreement that it shall bear confession of judgment in favor of the said mortgagees or any holder or holders of the said notes. Shows further, that said notes were paraphed "*Ne varietur*" by the notary, in order to identify them with the act of mortgage. All of which will more fully appear by reference to the notes and to a duly certified copy of the act of mortgage,

32 herewith filed and made part hereof hereof.

The premises considered, petitioner prays that the confes-

sion of judgment in said act of mortgage be made executory, and that an order of seizure and sale issue, directed to the sheriff of Madison parish, requiring him to seize and, after due notice, to sell all the property described in said act of mortgage to satisfy the claim of your petitioner, together with all costs of this proceedings.

Prays for general relief.

(Signed) A. R. HYNES & E. D. FARRAR,
Att'ys for Pet'r.

[The four notes, of which copies are annexed to foregoing petition, are transcribed at pages 5, 11, 12 of this transcript.]

Exhibit "G."—Filed November 7th, 1877.

Referred to and made part of supplemental and amended answer.

Judgment and Decree for Executory Process.

MARY CARTWRIGHT, Wife of W. ALEX. GORDON,
vs.
PATRICK GILFOIL. } No. 772.

33 Upon reading and considering the within petition, notes, and authentic documents annexed, and the law and the evidence being in favor of the plaintiff, Mary Cartwright, wife, &c., and against the defendant, Patrick Gilfoil, it is therefore, and by reason thereof, ordered, adjudged, and decreed that the confession of judgment contained in the act of mortgage be made executory, and that an order of seizure and sale issue, and the property hypothecated in said mortgage, to wit: a certain tract of land, established and cultivated as a cotton plantation, situate, lying, and being in the parish of Madison, in this State, consisting of the southeast quarter of section fifty-eight (58), in township eighteen (18) of range 13 east, in district of lands north of Red River, La., containing one hundred and sixty acres, and bounded north and west by lands of W. A. Peck, and south and east by lands of Mrs. W. F. Bledsoe, together with all the buildings and improvement on said land, the stock, implements, and appurtenances thereunto belonging, be seized and sold according to law, to satisfy said judgment and all costs of this proceedings.

34 Thus done and signed at Chambers this 9th day of February, A. D. 1869.

(Signed) WADE H. HOUGH.
Judge 13th District.

Exhibit "H."—Filed November 7th, 1877.

Referred to and made part of the supplemental and amended answer

Mrs. M. C. GORDON
vs.
PATRICK GILFOIL, J. H. GILFOIL, Int'r. } 13th District Court, Parish of Madison. No. 772.

To the Honorable the Judge of the Thirteenth Judicial District Court of the State of Louisiana and parish of Madison.

The petition of Mary Cartwright Gordon, wife of William Alexan-

der Gordon, residing with her said husband in the city of New Orleans, herein duly authorized and assisted by her said husband, who joins her in this suit for that purpose, with respect, makes known to your honorable court that she is the legal owner, by a just and valid title, of the following tract of land, lying and being situate in your said parish, and more particularly described in the sheriff's
35 deed to her as "A certain tract of land, established and cultivated as a cotton plantation, situate, lying, and being in the parish of Madison, in this State, consisting of the southeast quarter of section fifty-eight (58), in township 18 of range 13 east, in district of lands north of Red River, La., containing one hundred and sixty acres, and bounded north and west by lands of W. R. Peck, and south and east by lands of Mrs. W. F. Bledsoe, together with all the buildings and improvements on said land." Avers that your petitioner purchased said land at sheriff's sale, in your said parish, on the 3d day of July, A. D. 1869, as will more fully appear by reference to certified copy of deed annexed for reference, and that at said adjudication was placed in legal possession of the same.

Your petitioner avers that one Patrick Gilfoil, who is a mere trespasser, has taken possession of said property; that he has illegally and unjustly held possession of said property for the years A. D. 1870 and 1871; that the rent of said property is well worth the sum
36 of one thousand dollars per annum.

In consideration of the premises, your petitioner prays that said Patrick Gilfoil be cited to appear and answer hereto; that your petitioner's title be recognized, and that she have judgment for the property described in the petition, and that she have judgment against the said Patrick Gilfoil for the rents of said property for the years A. D. 1870 and 1871, at the rate of one thousand dollars per annum, and all costs of this proceeding.

Prays for general relief, &c.

(Signed) E. D. FARRAR,
Att'y for Petitioner.

The within suit is duly authorized by me, W. Alex. Gordon. (Endorsed:) No. 772; 13 District Court, parish of Madison; Mary Cartwright Gordon *vs.* Patrick Gilfoil; Filed Jan'y 15th, 1872.

Exhibit "M."—Filed November 7th, 1877.

Referred to and made part of supplemental and amended answer.

Petition of Intervention of J. H. Gilfoil.

MARY C. GORDON *vs.* PATRICK GILFOIL. } 13th District Court, Parish of Madison. No. 772.

37 To the Hon. Wade H. Hough, Judge of the Thirteenth District Court for the Parish of Madison.

The petition of James H. Gilfoil, of said parish, respectfully represents: That he is the legal and *bona-fide* owner of an undivided one-

half interest in and to the following described land, to which he acquired title by inheritance from his deceased mother, Mrs. Gilfoil, late wife of and partner in community with Patrick Gilfoil, his (petitioner's) father, to wit, the southeast quarter of section 58, in township 18 north, range 13 east, in this parish, containing one hundred and sixty acres. That said property was acquired by his said father and mother by purchase from Joseph L. Hynes, 1848, by deed bearing date 19th April, 1848, which has been duly recorded, as your petitioner will show on the trial thereof.

That your petitioner's said mother departed this life on or about the day of 18 , leaving your petitioner her sole surviving heir to all her estate, and that Mary Cartwright Gordon, plaintiff in the above-styled suit, is now endeavoring to obtain
38 possession of said land, by instituting the above suit against Patrick Gilfoil, petitioner's father, basing her title on a pretended sheriff's sale made under an order of seizure and sale issued from this honorable court at the suit of said Mary C. Gordon *vs.* Patrick Gilfoil, No. . Now, your petitioner avers that he is in no manner bound by said sale, if any ever took place, as he was no party to said proceedings, nor he or his said mother in any manner bound for said debt; but that said debt was contracted by the said Patrick Gilfoil long after the death of petitioner's said mother; and to protect the rights of your petitioner, it becomes necessary that he should intervene herein and assert his said rights.

Wherefore, the premises considered, your petitioner prays that he be allowed to intervene herein, and that the said Mary Cartwright Gordon and her husband, William A. Gordon, and the said Patrick Gilfoil, may all be duly cited to appear and answer this his said peti-
tion of intervention; that the said Mrs. Gordon be duly au-
39 thorized to defend this case, and after due proceedings had in the premises, your petitioner be adjudged to be the true and legal owner of said land, and that he be quieted in his possession and title thereto, and for costs, and general relief, &c.

(Signed) J. C. SEALE, *Att'y for Petitioner.*

Filed May 22d, 1872.

Exhibit "O."—Filed November 7th, 1877.

Referred to and made part of supplemental and amended answer.

Amended and Supplemental Petition of Mary C. Gordon, Plaintiff.

MARY C. GORDON *vs.* PATRICK GILFOIL. } No. 772. Thirteenth District Court, Parish of Madison.

And now comes Mary C. Gordon, plaintiff in the above-styled cause, and makes known to your honorable court, that since the filing of her original petition, and the service of the same upon Patrick Gilfoil, and since the filing of his answer thereto, the said Patrick Gilfoil has departed this life; that one James H. Gilfoil, who is now in possession of the property belonging to your petitioner,

and which was sued for in her original petition, and who claims to be the legitimate heir of said Patrick Gilfoil, still illegally and unjustly detains said property in his possession, and refuses to surrender the same, and that he has held the possession of said property ever since the death of the original defendant, Patrick Gilfoil; that if said Patrick Gilfoil left any succession at his death, the same has been taken possession of by the said James H. Gilfoil without any process of law, and used for his own purposes, whereby he became an intermeddler, thereby rendering himself liable for all the debts of the succession, and especially personally bound for the rents and revenues of the property from the date of the unlawful possession of the same by Patrick Gilfoil, deceased.

Wherefore, in consideration of the premises, petitioner prays leave to file this her amended and supplemental petition; that the said James H. Gilfoil be made a party to this suit; that service of her original petition and of this amended and supplemental petition, together with citation, be served upon him; and that after due proceedings had, petitioner recover of him judgment as prayed for in her original petition, and one thousand dollars per annum since the death of Patrick Gilfoil for the rents and revenues of the property. Prays as in her original petition, and for general relief.

(Signed) E. D. FARRAR, *Att'y for Pet'r.*

E. D. Farrar, attorney in the above, swears that, to the best of his knowledge and belief, the Hon. Wade H. Hough, judge of the 13th District Court, is now absent from the parish of Madison.

(Signed) E. D. FARRAR.

Sworn to and subscribed before me this 4th day of April, A. D 1874.

[SEAL.] (Signed) J. W. BRUTON, *D'y Clk.*

The within petition and affidavit annexed being considered, it is ordered that leave of the court is granted to file this amended petition, and that the same be made a part of the record, and served as prayed for.

Done and signed at Chambers this 4th day of April, 1874.

(Signed) ELIAS S. DENNIS, *Parish Judge.*

Filed April 4th, 1874.

Exhibit "R."—Filed November 7th, 1877.

Referred to and made part of supplemental and amended answer.

Answer of J. H. Gilfoil, Intervenor.

MARY C. GORDON, Wife, &c., *vs.* P. GILFOIL, J. H. GILFOIL, Intervenor. } Thirteenth District Court, Parish of Madison. No. 772.

J. H. Gilfoil, made defendant in the above-described suit, denies each and every allegation in plaintiff's original and supplemental

petition, and insists on strict proof of the same, and further specially deny that any legal sale was ever made of said land; that the sale pretendly made was illegal, null, and void, because no notice of such order of seizure and sale was ever served on P. Gilfoil, or that there was any legal seizure or advertisement or appraisement.

That said sale is null as to this respondent, who was no party to the proceedings; that he only possessed to the extent of his
43 own one-half interest, as claimed by him, as heir of his mother, and denies that he is bound in any manner for rents.

He further prays that plaintiff's demand be rejected, and for costs.

(Signed) J. C. SEALE, *Att'y for Resp't.*

Filed November 21st, 1874.

Exhibit "T."—Filed November 7th, 1877.

Referred to and made part of supplemental and amended answer.

Answer of Plaintiff to Intervention.

MARY C. GORDON } 13th District Court,
vs. } Parish of Madison,
PATRICK GILFOIL, Interv'nr of Jas. H. Gilfoil. } No. 772.

And now comes Mary C. Gordon, made one of the defendants by the intervention of James H. Gilfoil, and, for answer to the petition of intervenor, denies generally and specially all the allegations in said petition contained.

Further answering, respondent denies that said James H. Gilfoil is the legal heir of said Patrick Gilfoil or of his said wife,
44 Mistress Gilfoil, or that any community of acquets and gains ever existed, or that the property purchased by this respondent at sheriff's sale was community property; but avers that it was the separate property of said Patrick Gilfoil, solemnly declared to be such by said Patrick Gilfoil in the act of mortgage which he gave upon said land, as will be shown upon the trial hereof.

But in the event that it should be proven to be community property, then respondent avers that the debt contracted, for which said property was sold, was a community debt, and as such that the property was liable for said community debt, and was properly and legally sold to pay the same.

Wherefore respondent prays that the petition of James H. Gilfoil be rejected at his costs; that this respondent be decreed to be the legal owner, by just and valid title, of the land described in her original petition; and that she have judgment against the said James H. Gilfoil for the rents and revenues of said property since the first day of January, A. D. 1870, till the final determination of this suit, at the rate of one thousand dollars per annum. Prays for general relief. (Signed) E. D. FARRAR.

45 Filed April 4th, 1874.

Exhibit "V."—Filed November 7th, 1877.

Referred to and made part of supplemental and amended answer.

Plea of Prescription.

MARY C. GORDON
vs.
P. GILFOIL, J. H. GILFOIL, Intervenor. } 13th District Court, Parish of Madison. No. 772.

James H. Gilfoil appears, by his undersigned counsel, and pleads by way of peremptory exception, that the debts acknowledged by P. Gilfoil was prescribed at the date of said acknowledgment. He therefore pleads the prescription of three years, and of five years, and prescription generally.

And prays that this suit be dismissed, &c.

(Signed) J. C. SEALE,
Filed November 21st, 1874. *Att'y for J. H. Gilfoil.*

Exhibit "W."—Filed November 7th, 1877.

Referred to and made part of supplemental and amended answer.

Judgment.

46 MRS. MARY CARTWRIGHT GORDON
vs.
PATRICK GILFOIL, JAS. H. GILFOIL, Intervenor. } 13th District Court, Parish of Madison, No. 772.

This case having been regularly fixed, and called for trial, and tried, and the parties, plaintiff, defendant, and intervenor, having been heard by their pleadings, evidence, and counsel, and the law and the evidence being in favor of the plaintiff and against defendant, it is therefore, and by reasons thereof, ordered, adjudged, and decreed that Mary Cartwright Gordon, plaintiff, do have and recover of James H. Gilfoil, administrator, defendant, judgment decreeing plaintiff to be the owner, by just and valid title, of the one undivided half of the southeast quarter of section fifty-eight (58), in township eighteen (18) of range (13) thirteen east, in district of lands north of Red River, Louisiana, containing one hundred and sixty (160) acres. And it is further ordered, that plaintiff have judgment against defendant for the rents and revenues of said property at the rate of one hundred and twenty-five ($125) dollars per annum, from
47 the years A. D. 1870, 1871, 1872, 1873, 1874, at that rate until the said property is delivered up to the possession of plaintiff; and it is further ordered, that a writ of possession issue, and that plaintiff be put in possession of the land described; costs of suit to be taxed. And it is further ordered, that there be judgment in favor of James H. Gilfoil, intervenor, decreeing him to be the owner of the other and remaining one undivided half of the land described in this judgment, by virtue of his (intervenor's) inheritance from his deceased mother, Catherine Gilfoil, deceased, who is decreed to have been the undivided half owner, as partner in community with her husband, Patrick Gilfoil; costs of suit to be taxed, to be paid by plaintiff and defendant.

Read and signed in open court this 23d day of November, A. D. 1874. (Signed) WADE H. HOUGH,
Judge 13th District.

Judgment filed November 23d, 1874.

Exhibit "Y."—Filed November 7th, 1877.

Referred to and made part of supplemental and amended answer.

Decision.

48 MRS. MARY C. GORDON *vs.* PATRICK GILFOIL *et al.* } No. 5665. Supreme Court of La.

Mr. Justice Talifero.

Appeal from the 13th Judicial District Court, parish of Madison.

Under an order of seizure and sale against the property of the defendant at the suit of the plaintiff, sale of the tract of land now in controversy was made on the 3d day of July, 1869, the plaintiff becoming the purchaser.

The defendant remained in possession.

On the 15th January, 1872, plaintiff brought this suit, setting up title under the sheriff's sale, and praying to be recognized as owner, and to recover the property.

The defendant answered, setting up the nullity of all the proceedings under the order of seizure and sale, and averring that none of the forms of law were observed in making the sale, specifying several of the alleged formalities.

J. H. Gilfoil, the son of the defendant, intervened, claiming one-half of the land in right of his deceased mother, the land
49 being community property between herself and the defendant.

Pending this suit, it seems the defendant died, and the plaintiff filed a supplemental petition, making the intervenor a party defendant, as heir of his deceased father.

The intervenor, answering this supplemental petition, pleads a general denial, and specially pleads the nullity of the proceedings under which the sale of the property is alleged by plaintiff to have been made by the sheriff; that the pretended sale is null as to him, who was no party to the proceedings.

It is alleged that there was no notice of seizure given in the proceedings *via executiva*, as the law requires, and that the sheriff's return of service of the notice is defective and illegal.

That no legal and valid seizure of the property was made; we think the defendant has shown that the exception in regard to the seizure was well taken and must prevail.

The proof is, that the sheriff at no time had the mortgaged property in his possession, either under his personal control or
50 under that of a keeper. The defendant, Patrick Gilfoil, remained after this pretended seizure in undisturbed possession

of the premises, managing and controlling the place exclusive of everybody else.

An actual corporal possession of property seized must take place in order to make a sheriff's seizure valid, and to render a compliance with the law complete.

The sheriff must have the property in his own possession and under his own control, or in the possession and under the control of some person duly appointed and authorized by him.

See the case of Corse *vs.* Stafford, 24 Annual, 262, and cases there cited.

We regard the seizure in this case as a mere paper seizure, and the sheriff's sale as a nullity.

It is therefore ordered, that the judgment of the lower court, so far as it is rendered in favor of the plaintiff, be annulled and avoided, and that its decree in favor of the intervenor be affirmed.

It is now further ordered, that there be judgment in favor
51 of defendant, the plaintiff paying costs in both courts.

Decree rendered March 8th, 1875.

Enf'g waiver of Jury, and Motion and Order.—Case fixed for Trial.—Extract from the Minutes, April Term, 1877.

New Orleans, Friday, May 22d, 1877. Court met pursuant to adjournment. Present: Hon. E. C. Billings, District Judge.

MARY C. GORDON *vs.* JAMES H. GILFOIL. } No. 7956.

On motion of Samuel R. & C. L. Walker, of counsel for defendant, and on suggesting to the court that both parties have agreed to waive the trial by jury herein—

It is ordered, That this cause be fixed for final hearing on Wednesday, the 30th day of May, 1877, at 11 o'clock A. M., and that plaintiff's counsel, H. B. Kelly, Esq., be duly notified hereof.

Agreement.—Filed June 4th, 1877.

52 MRS. MARY C. GORDON *vs.* JAMES H. GILFOIL. } U. S. Circuit Court. No. 7956.

It is hereby stipulated and agreed, between H. B. Kelly, Esq., counsel for plaintiff herein, and Samuel R. & C. L. Walker, counsel for defendant—

1. That trial by jury is waived by both parties, and the jury dispensed with; and

2. That the transcript of the case of Gordon *vs.* Gilfoil, No. 5665 of the Supreme Court of La., and the testimony therein contained, with the extracts therefrom referred to as exhibits in defendant's answer, be admitted in evidence; and counsel being satisfied as to

genuineness and correctness, that the authentication and certificates thereto be dispensed with.

(Signed) HENRY B. KELLY.

N. O., June 1, 1877.

(Signed) SAM'L R. & C. L. WALKER,
Counsel for Defendant.

Exception.—Filed June 4th, 1877.

MRS. MARY C. GORDON
vs.
JAMES H. GILFOIL. } U. S. Circuit Court. No. 7956.

53 And now into court comes again the defendant, James H. Gilfoil, and makes to the demand of plaintiff the peremptory exception, founded in law, of *res adjudicata*, in that all the issues herein involved have been adjudged in a proceeding upon the same cause of action and between the same parties, as will more fully appear by reference to defendant's answer herein.

Wherefore defendant prays that this exception be maintained, and said plaintiff's action be dismissed.

(Signed) SAMUEL R. & C. L. WALKER,
Def'dt's Att'ys.

Motion and Order.—Case fixed for Trial.—Extract from the Minutes, November Term, 1877.

New Orleans, Friday, November 9, 1877. Court met pursuant to adjournment. Present: Hon. E. C. Billings, District Judge.

M. C. GORDON
vs.
J. H. GILFOIL. } No. 7956.

On motion of Sam'l R. & C. L. Walker, solicitors for defendant: Ordered, That the cause be fixed for trial on the 15th instant, at 11 A. M., and that plaintiff be notified.

54 *Note of Evidence.—Filed November 15th, 1877.*

GORDON
vs.
GILFOIL. } No. 7956.

Pl'ff offered 4 notes, (1, 2, 3, and 4,) and act of mortgage.

Also the transcript from the Supreme Court of La., suit No. 5665.

Def't offered the 10 exhibits, annexed to answer, marked F, G, H, M, O, R, T, V, W, and Y.

Case submitted; 3 days to furnish briefs.

N. B.—The notes and act of mortgage mentioned in the foregoing note of evidence, marked A, B, C, D, E, are transcribed as follows: The act of mortgage, (exhibit A,) at page five; the notes B and C, at page 11, and notes D and E, at page 12. The exhibits F, G, H,

M, O, R, T, V, W, and Y, as follows: Exhibit F, at page 28; G, page 32; H, page 34; M, page 36; O, page 39; R, page 42; T, page 43; V, page 45; W, page 45; and Y, page 47 of this transcript.

Transcript from Supreme Court of Louisiana.—Offered by Pl'ff November 15, 1875.

55 MRS. M. C. GORDON *vs.* PATRICK GILFOIL, J. H. GILFOIL, Int'r. } No. 772. 13th Dist. Court, Madison Parish.

Petition (exhibit "H") is transcribed at page 34 of this transcript.

Citation.

MARY C. GORDON *vs.* PATRICK GILFOIL. } No. 772. The State of Louisiana, Parish of Madison, Thirteenth District Court.

To Patrick Gilfoil, residing in the parish and State aforesaid.

You are hereby cited either to comply with the demand contained in the petition of the said Mary Cartwright Gordon, of which a copy accompanies this citation, or to deliver your answer to the said petition at the office of the clerk of said court, held in the town of Deta, within said parish, within thirteen days from the service hereof.

Witness the Honorable Wade H. Hough, judge of said court, [SEAL] and the official seal thereof, this 15th day of January, A. D. 1872.

S. S. PRENTISS DANGERFIELD,
Clerk of said Court.

56 Rec'd January 15th, 1872, and served on the 17th day of same month and year, by handing a copy of this citation and accompanying petition to the said Patrick Gilfoil in person, within this parish, distant about 30 miles. Returned Jan'y 20th, 1872.

Service $2.00. E. M. CRAMER, *Sheriff.*
Mileage 6.00. By DAVID W. TELL, *D'y Sh'ff.*

(Endorsed:) No. 772, N. S.; Citation; original filed January 22d, 1872; S. S. Prentiss Dangerfield, clerk. To Patrick Gilfoil.

Petition of intervention of J. H. Gilfoil (exhibit "M") is transcribed at page 36 of this transcript.

The above-mentioned petition of intervention is endorsed No. 772, 13th District Court, Mary C. Gordon *vs.* Patrick Gilfoil, Jas H. Gilfoil, intervenor; petition of intervention of Jas. H. Gilfoil; filed May 22d, 1872; S. S. Prentiss Dangerfield, clerk.

Endorsed on a certified copy of the foregoing intervention: Filed May 19, A. D. 1873; "Service of citation and petition accepted;" "Mary C. Gordon per pro W. Alex. Gordon, authorized by me, W. Alex. Gordon; New Orleans, Nov. 29, '72.

57 *Citation of Intervention.*

MARY C. GORDON *vs.* PATRICK GILFOIL, J. H. GILFOIL, Int'r. } The State of Louisiana, Parish of Madison, Thirteenth District Court. No. 772, N. S.

To Patrick Gilfoil, residing in the parish and State aforesaid:

You are hereby cited either to comply with the demands contained in the petition of intervention of the said J. H. Gilfoil, of which a copy accompanies this citation, or to deliver your answer to the said petition at the office of the clerk of said court, held in the town of Delta, within said parish, within thirteen days from the service hereof.

Witness the Honorable Wade H. Hough, judge of said court, [SEAL.] and the official seal thereof, this 31st day of July, A. D. 1872. CHAS. R. BRUTON,

D'y Clerk of said Court.

Rec'd July 31st, 1872, and proceeded to serve the same on the 9th day of October, when I found that the said Patrick Gilfoil had departed this life. Returned Oct. 16th, 1872.

Mileage, $6.00. JOHN C. FELL, *D'y Sheriff.*

(Endorsed:) No. 772, N. S.; Citation; original filed Oct. 17, 1872; S. S. Prentiss Dangerfield, clerk.

58

Extract from the Minute Book of the District Court, January 31st, A. D. 1872, E, pp. 293.

MARY C. GORDON *vs.* PATRICK GILFOIL. } No. 772.

In this case the defendant having failed to appear in person or by counsel, judgment by default was rendered against him. Case continued.

May 22d, 1872, E, pp. 360.

MARY C. GORDON *vs.* PATRICK GILFOIL. } No. 772.

In this case there was an intervention filed by J. H. Gilfoil, and ordered to be served.

November 11th, 1873, E, pp. 370.

MARY C. GORDON *vs.* PATRICK GILFOIL. } No. 772.

The death of the defendant being suggested, it was ordered that this suit be revived against his legal representatives.

May 13th, 1873, E, pp. 419.

MARY C. GORDON
vs.
PATRICK GILFOIL. } No. 772.

59 On motion of plaintiff's counsel, this case was fixed for trial to-morrow.

Amended and supplemental petition of plaintiff (exhibit "O") is transcribed at page 39 of this transcript.

Citation of Amended Petition.

MARY C. GORDON
vs.
PATRICK GILFOIL. } No. 772, N. S.

The State of Louisiana, parish of Madison, Thirteenth District Court, to James H. Gilfoil, residing in the parish and State aforesaid.

You are hereby cited either to comply with the demands contained in the petition and amended petition of the said Mary C. Gordon, of which a copy accompanies this citation, or to deliver your answer to the said petition at the office of the clerk of said court, held in the town of Delta, within said parish, within fourteen days from the service hereof.

Witness the Honorable Wade H. Hough, judge of said court, [SEAL.] and the official seal thereof, this 6th day of April, A. D. 1874.

J. W. BRUTON, *D'y Clerk of said Court.*

60 Rec'd April 6th, 1874, and served on the 13th day of same month and year upon James H. Gilfoil, by handing a certified copy of this citation and accompanying petition to a person over the age of 14 years, whose name I knew of my own knowledge to be Mrs. J. H. Gilfoil, at and residing at the domicil of the said James H. Gilfoil, within this parish, he (Gilfoil) being absent at the time of making this service. Returned April 16th, 1874.

E. M. CRAMER, *Sheriff.*
By ALBERT WILLIAMS,
Constable, 3d Ward.

Service $2.00.
Mileage 5.00.

(Endorsed: No. 772, N. S.; Citation; original filed April 15th, 1874; J. W. Bruton, d'y clerk. To J. H. Gilfoil.

Extract from the Minute Book of the 13th Dist. Court, November 11, 1874, *E, pp.* 483.

MRS. M. C. GORDON
vs.
PATRICK GILFOIL, JAS. H. GILFOIL, Int'r. } 772.

In this case there was an amended answer filed, and the case set for trial on Monday next.

Answer of Pat. Gilfoil.

MARY CARTWRIGHT, wife of W. A. Gordon, vs. P. GILFOIL. } Parish Madison, Dist. Court.

61

The defendant appears, and for answer denies generally and specially each and every allegation in petition contained, except such as he may hereafter admit. He specially denies that plaintiff has any good and valid title to the land set out in petition; that the title set up in petition is worthless, null, and void.

Wherefore he prays that plaintiff's demand be rejected, and that his pretended title to said land be decreed to be null and void, and set aside and rescinded, and for general relief.

J. W. MONTGOMERY, *Att'y.*

(Endorsed:) 772; Mary Cartwright Gordon *vs.* P. Gilfoil; Answer, filed May 24th, 1872; S. S. Prentiss Dangerfield, Clerk.

Amended Answer of Defendant.

MRS. MARY GORDON vs. GILFOIL *et al.* }

The defendant, by leave of court, amends his answer and sets out the allegations more fully, and in detail, so as to particularize the cause of nullity; shows that the executory proceeding under

62

which the property mentioned was sold to pl'ff by the sheriff were in every respect illegal; that no service of notice of the order of seizure and sale, nor any notice of seizure of the property, nor any appraisement of the property legally made, nor any of the forms of law observed by the sheriff in making such sale; that no due and valid advertisement was made.

Defendant therefore prays as in his original answer.

J. W. MONTGOMERY, *Att'y.*

(Endorsed:) 772; Gordon *vs.* Gilfoil; Amended Answer, filed Nov. 11, 1874; P. J. Watson, clerk.

Answer of J. H. Gilfoil, Int'r, (exhibit "R,") is transcribed at page 42 of this transcript.

Answer of pl'ff to intervention (exhibit "T") is transcribed at page 43 of this transcript.

Plea of prescription (exhibit "V") is transcribed at page 45 of this transcript.

Extract from Minute Book of the District Court, November 21, 1874, *F, pp.* 2.

63 MRS. M. C. GORDON *vs.* PATRICK GILFOIL, J. H. GILFOIL, Int'r. } 772.

This cause was taken up for trial, evidence introduced, argument had, &c., and judgment in favor of pl'ff and int'r. (See decree.)

Note of Evidence.

MRS. M. C. GORDON *vs.* PATRICK GILFOIL, JAS. H. GILFOIL, Int'r. } State of Louisiana, Parish of Madison, 13th Dist. Court, Nov. Term, A. D. 1874.

Plaintiff offers the sheriff's deed, marked "A." It is admitted that the property involved in this suit is worth two hundred and fifty dollars a year rent, and that James H. Gilfoil resided with his father on the place at the time of his death, and still resides there, and that he has possession of the same; that Patrick Gilfoil died on the 2d of October, 1872, and that Patrick Gilfoil acquired the property from Jos. L. Hynes, by a deed of date 19th of April, 1848; that James H. Gilfoil is the son and only heir of Catherine Gilfoil, wife of Patrick Gilfoil, and that she died on the 13th of April, 1866; that
64 Frank Parnell left this parish on or about the 1st of May, A. D. 1869, and that John A. McDonough left here some time in the fall of 1869; offers the depositions of Jules C. Dennis and Jules Train, marked "B," the mortgage of Pat. Gilfoil, in favor of Gordon & Castillo, "C." It is admitted that James H. Gilfoil was fifteen years of age in 1867.

Plaintiff closed.

Defendant offers in suit No. 572 petition, "D"; copy of mortgage, "E"; notes, "F"; order of seizure and sale, "G"; and notice of order and sheriff return thereon, "H"; all in said suit.

JAMES H. GILFOIL, sworn for the def't, says: That he was on the place in suit in March, 1869; says that the sheriff, nor his deputy, never did come upon the place and take actual possession of the property; the place has always been under the control of witness or his father; when not cultivated by them they leased it.

Cross-examined for pl'ff, says:

He was about sixteen years old in 1859, and was living on the place from about the 22d day of March, 1869; left the place occasionally; was not there every day; sometimes went hunting,
65 and sometimes to Omega; seldom went to Milliken's Bend; was not all the time with his father, but was with him almost every day, but not all the time during the day; the sheriff may have been on the place and seized it when witness was not present; may have been from the place one or two days since that time, but have no recollection of such times.

Re-examined:

During that time there was an agent on the place, placed there by witness's father, and Mr. Riley, the agent had rented the place, and had control of it during the time he was on there, and had control of it during that year, up till some time in November.

JOHN LEE, sworn for def't, says that during the year 1869 he lived on the Peck back place, which joins the Gilfoil place; was frequently on that place, and visited the place frequently, and was frequently on the place during the months of March, April, May, and June, 1869.

66 Mr. Pat. Gilfoil, dec'd, had the management and control of the place at that time; was there frequently during the balance of the year 1869, and Mr. Pat. Gilfoil had control of the place.

Def't closed.

Intervenor's Evidence. It is admitted that James H. Gilfoil, int'r, was emancipated before this intervention was filed, (being a minor,) and that the property was not advertised for sale in the newspaper, no paper being published in the parish at that time.

I hereby certify that the foregoing is a true and correct note of evidence offered on the trial of the above case.

[SEAL.] Attest: J. W. BRUTON, *D'y Cl'k.*

(Endorsed:) No. 772, 13th District Court; Mrs. M. C. Gordon *vs.* Pat. Gilfoil, J. H. Gilfoil, int'r; Note of Evidence; Filed Nov. 21st, 1874; J. W. Bruton, cl'k.

Sheriff's Deed, "A."

STATE OF LOUISIANA,
Parish of Madison.

Be it known, that by virtue and in pursuance of a writ of seizure and sale to me directed, from the honorable the thirteenth District Court for the parish of Madison, Louisiana, in the suit styled Mary Cartwright, wife of W. Alex. Gordon, *vs.* Patrick Gilfoil, No.

67 572, N. S., of the docket of said court, I, John A. McDonough, sheriff of the parish of Madison, and State of Louisiana, did seize and take into my possession all the following-described property, to wit, all the right, title, and interest of the defendant, Patrick Gilfoil, in and to "a certain tract of land, established and cultivated as a cotton plantation, situate, lying, and being in the parish of Madison, in this State, consisting of the southeast quarter of section fifty-eight (58), in township 18 of range 13 east, in district of lands north of Red river, La., containing one hundred and sixty acres, and bounded north and west by lands of W. R. Peck, and south and east by lands of Mrs. W. F. Bledsoe, together with all the buildings and improvements on said land, the stock, implements, and appurtenances thereunto belonging;" and after giving three days' notice of seizure to the defendant, by serving a copy on him at his residence in this parish, I proceeded to advertise said property for sale, by posting notices

of sale or advertisements at the door of the court-house and two other public places in the parish of Madison, viz., De Soto and Milli-
68 ken's Bend, sale to take place on the first Saturday, the third day of July, A. D. 1869, at the door of the court-house in the town of Delta, La.; and after thirty clear days' advertising as aforesaid, and on said Saturday, the third day of July, 1869, between the hours prescribed by law, I proceeded, at the door of the court-house aforesaid, to read the writ of seizure and sale, notice of seizure and return thereon, advertisement, and the certificate of mortgages recorded against said property, and after having said property duly appraised, to offer said property at public auction, for sale for cash, that being the time, place, and terms of sale mentioned in the advertisement, and Edgar D. Farrar, attorney for Mary Cartwright Gordon, wife of W. Alex. Gordon, being present, bid for said property the sum of six hundred dollars ($600), being more than two-thirds of its appraised value, and which being full two-thirds of the appraised value of said property, the same was struck off and adjudicated to Mrs. Mary Cartwright Gordon, wife of W. Alexander Gordon, a resident of the city of New Orleans, at and for said price, and she having
69 complied with the terms of sale:

Now, therefore, in virtue of the premises and in consideration of the payment of the bid as above stated, I, John A. McDonough, sheriff as aforesaid, do hereby sell, transfer, convey, and deliver unto the said Mrs. Mary Cartwright Gordon, her heirs and assigns, forever, all the right, title, and interest of the said Patrick Gilfoil in and to the property hereinbefore described; to have and to hold to her, the said Mrs. Mary Cartwright Gordon, her heirs, executors, administrators, and assigns forever. In testimony whereof, I hereunto sign my name, in presence of S. S. Prentiss Dangerfield and Alfred M. Cramer, two competent witnesses, of lawful age, residing in this parish, who sign with said sheriff on this the 3d day of July, A. D. one thousand eight hundred and sixty-nine.

JOHN A. McDONOUGH, *Sheriff.*

Witnesses: By D. D. DE MOSS, *D'y Sh'ff.*

S. S. PRENTISS DANGERFIELD.

A. M. CRAMER.

Recorded in 13th District Court clerk's office, in sheriff's transfer book "C," pages 140, 141, and 142. July 5th, 1869.

S. S. PRENTISS DANGERFIELD,
Clerk of said Court.

70 STATE OF LOUISIANA,
Parish of Madison.

I, A. V. Brown, recorder in and for the parish of Madison, certify that the within and foregoing transfer has been duly recorded in notarial record book "G," pages 232 & 233.

Witness my hand and official seal this 7th day of July, A. D. 1869.

[SEAL.] A. V. BROWN, *Recorder.*

STATE OF LOUISIANA, *Parish of Madison.* } 13th District Court, Clerk's Office.

I, S. S. Prentiss Dangerfield, clerk of said court, do hereby certify that the above and foregoing is a true and correct copy of the original transfer, as now remains on file in this office.

Witness my signature and official seal, at Delta, La., this 10th day of July, A. D. 1869. S. S. PRENTISS DANGERFIELD,
[SEAL.] *Clerk of said Court.*

(Endorsed:) No. 772; Filed January 15th, 1872; S. S. Prentiss Dangerfield, clerk.

Depositions of Dennis & Traine.

MARY CARTWRIGHT GORDON *vs.* PATRICK GILFOIL, JAS. H. GILFOIL, Int'r. } 13th District Court, Parish of Madison, State of Louisiana.

71 Interrogatories to be propounded to Jules C. Denis, Jules Train, and Edgar Pitot, witnesses, residing in the city of New Orleans, whose answers, when taken in writing, shall be read as evidence upon the trial hereof, in behalf of plaintiff in the above entitled cause:

Interrogatory 1st. Are you acquainted with the parties to this suit?

Int. 2d. Were you acquainted with the commercial firm of W. A. Gordon & Castillo, heretofore residing and doing business in the city of New Orleans; and if yea, how long and how intimately did you know said firm, and how long did they continue to transact business under said name and style? Were or were they not cotton factors and commission merchants; and if yea, did they not receive cotton shipped to them on consignment and sell the same for a commission; and were they or not in the habit of making advances of money and supplies to correspondents upon the promise of the shipment or consignment of their crop of cotton?

72 Int. 3d. Was or was not Patrick Gilfoil, a planter, residing in Madison parish, a correspondent of said firm and in the habit of receiving advances from them, and consigning to said firm his annual crops of cotton for sale?

Int. 4th. If yea, when did said Gilfoil commence transacting business with said firm, and how long did he continue to do business with them?

Int. 5th. What was the custom of the firm of W. A. Gordon & Castillo in their business transactions with their correspondents? Were they or not in the habit of closing their accounts annually with their correspondents, or otherwise?

Int. 6th. Do you know whether or not Patrick Gilfoil was indebted to the firm of W. A. Gordon & Castillo in the year A. D. 1865; and if he was so indebted within your knowledge, please state the amount of said indebtedness, how and when the same was contracted, and in what manner said indebtedness was acknowledged, closed, or

liquidated? Was it or not by a renewal of notes previously given, or the closing of accounts stated, and acknowledged by the giv-
73 ing of notes? And if you state that notes were given in consideration of said indebtedness, please give the number and amounts of said notes, their dates, &c., and whether or not the same were secured by mortgage.

Int. 7. Please state, if you know, the origin, the continuance, and the closing of Patrick Gilfoil's indebtedness to W. A. Gordon & Castillo; when the same commenced; how it was continued, and how finally closed; and attach to your answers hereto a sworn copy of all the accounts had by said firm with said Gilfoil from their inception to their close, as appears by the books of said firm?

Int. 8. If you state that the indebtedness of Patrick Gilfoil to the firm of W. A. Gordon & Castillo was closed by notes secured by mortgage, please state when and where said notes were given and said mortgage executed, how many notes were given, and what disposition was made of them?

Int. 9th. Did or did not a portion of said notes fall into the hands of Mrs. Mary Cartwright Gordon, wife of William A. Gordon; and if yea, in what manner, and were they or not subsequently sued upon, and the mortgage given to secure them made executory by the sale of the property?

74 Int. 10th. Under this general interrogatory, please state all you may know of benefit to the plaintiff in the prosecution of her suit, as fully and as explicitly as if specially interrogated thereto.

E. D. FARRAR,
Att'y for Plaintiff.

E. D. Farrar, attorney for plaintiff, makes oath that to the best of his knowledge and belief the Hon. Wade H. Hough, district judge, is now absent from the parish of Madison; that the interrogatories propounded above are material. E. D. FARRAR.

Sworn to and subscribed before me this 17th October, 1874.

ELIAS S. DENNIS,
Parish Judge.

Let a commission issue, directed to a competent authority, to take testimony of the within-named witnesses, to be made returnable on or before the 16th day of November, A. D. 1874.

ELIAS S. DENNIS,
Parish Judge.

We accept service of the within interrogatories, and waive copies and formalities, reserving all legal objections to the admissi-
75 bility of the evidence which could be urged if the witnesses were on the stand in open court.

October 17th, 1874. SEALE & MORRISON,
Att'ys for J. H. Gilfoil, Int'r.

I received a certified copy of the within interrogatories on the 20th day of October, 1874, and served the same on the 4th day of Novem-

ber, same year, by handing said certified copy to James H. Gilfoil, administrator of Patrick Gilfoil, deceased, in person, within this parish.

Service, $5.00. E. M. CRAMER, *Sheriff.*
Mileage, $6.00. by D. W. FELL, *D'y Sheriff.*

(Endorsed:) 772, Mary Cartwright Gordon *v.* Patrick Gilfoil, Jas. H. Gilfoil, Int'r. Interrogatories to Jules C. Dennis *et al.*, filed October 17th, 1874. J. W. Bruton, d'y clerk.

Commission.

MARY C. GORDON *vs.* PATRICK GILFOIL, J. H. GILFOIL, Int'r. } No. 772. The State of Louisiana, Parish of Madison, 13th District Court.

The State of Louisiana and said court to J. G. Eustis, notary public, 33 Carondelet street, New Orleans.

Know ye, that we, reposing confidence in your prudence and fidelity, do by these presents give unto you authority dili-
76 gently to examine Jules C. Denis, Jules Train, and Edgar Pitot, of New Orleans, in a certain suit now pending in our court, in which Mary C. Gordon is plaintiff and Patrick Gilfoil defendant, and J. H. Gilfoil intervenor, on the part of said plaintiff. Therefore we desire you, at certain times and places by you to be appointed for that purpose, to cause the said witnesses to come before you; that you then and there examine them upon their oath, first taken before you upon the Holy Evangelists; that you reduce the said examination to writing, and when you shall have so taken the same, you send it closed up under seal to us, in our said court, at the court-house at Delta, La., on or before the second Monday of November, 1874; and have you then and there this writ.

[SEAL.] Witness the Honorable Wade H. Hough, judge of said court, this 17th day of November, A. D. 1874.

J. W. BRUTON, *D'y Clerk.*

JULES C. DENIS, of lawful age, who, being duly sworn on the Holy Bible, on this 12th day of November, 1874, deposes and says as follows:

1st. To the 1st Int. he says: I am.

77 2d. To the 2d Int. he says: I was acquainted with the commercial firm of W. A. Gordon & Castillo; I knew said firm during its entire existence, and was a partner thereof. They commenced business in 1857, and continued to 1862. They were cotton factors and commission merchants, and did receive cotton shipped to them on consignment, and sold the same for a commission, and they were in the habit of making advances, as inquired about.

3d. To the 3d Int. he saith: He was and did.

4th. To the 4th Int. he saith: He commenced transacting business with the firm in 1859, and continued until the fall of 1861 or the be-

ginning of 1862, when an interruption took place by the capture of this city by Admiral Farragut.

5th. To the 5th Int. he saith: They were.

6th. To the 6th Int. he saith: In 1865 Patrick Gilfoil was indebted to the firm of W. A. Gordon & Castillo to the amount of ($4,586.83) forty-five hundred and eighty-six $\frac{83}{100}$ dollars, with interest from the 20th of December, 1861, as appears by annexed account, marked "A."

In compromise of said amount, and all interest due, Patrick
78 Gilfoil subscribed four notes, dated the 17th of January, 1867, as follows: One due 1st of January, 1868, for ($1750) seventeen hundred and fifty dollars; one due 1st of January, 1869, for same amount; one due 1st of January, 1868, for ($527) five hundred and twenty-seven dollars; one due 1st of January, 1869, of ($500) five hundred dollars, all bearing interest from the 1st of January, 1866, at 8 per cent.; and to secure the faithful payment of said notes, said Gilfoil mortgaged his plantation, as per act passed before P. Chas. Cuvellier, notary public, in this city, on the 17th of January, 1867.

7th. To the 7th Int. he saith, I annex full accounts from the beginning to the ending of his transactions with W. A. Gordon & Castillo, marked exhibits Nos. 1, 2, 3, 4, 5, and "A," showing advances made him in money, general supplies, provisions, &c., for the use of his plantation, and steamboat freight on same paid, &c.

8th. To the 8th Int. he saith: I have already stated that the mortgage was executed before P. C. Cuvellier, notary, in this city, on the 17th of January, 1867. I have also given the description and number of the mortgage notes subscribed by said Patrick Gilfoil, which

were turned over to the representatives of the estate of Dr. S.
79 A. Cartwright in liquidation and settlement of our endorsement of Gilfoil's previous notes.

9th. To the 9th Int. he saith: They did, as co-heirs in her father's estate; they fell to her in the act of partition.

10th. To the 10th Int. he saith: I know nothing more.

J. C. DENIS.

Sworn to and subscribed before me this 12th day of November A. D. 1874. [SEAL.] J. G. EUSTIS, *Not. Pub.*

And the said JULES TRAINE, being first duly sworn on the Holy Bible, on this 12th day of November, in the year A. D. 1874, doth depose and say as follows:

1st. To the 1st. Int. he saith: I am commercially acquainted with the names.

2d. To the 2d Int. he saith: I was acquainted with the firm from the beginning of their existence in 1857 to 1861, and was a clerk of said firm during the whole of said time; they were and did.

3d. To the 3d Int. he saith: he was and did do business with the firm.

4th. To the 4th Int. he saith: the account shows that he commenced business with said firm in March, 1859, and continued until interrupted by the war.

5th. To the 5th Int. he saith: Yes.

80 6th. To the 6th Int. he saith: I know nothing of the matter enquired about in this interrogatory.

7th. To the 7th Int. he saith: As a clerk of said firm I have purchased goods, &c., which were shipped for the use of Mr. Gilfoil's plantation. As to the remainder of this question I know nothing.

8th. To the 8th Int. he saith: I know nothing about the matters enquired.

9th. I do not know.

10th. I know nothing more. JULES TRAIN.

Sworn to and subscribed before me this 12th day of November, 1874. [SEAL.] J. G. EUSTIS, *Not. Pub.*

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans, } *ss:*

I, John G. Eustis, the undersigned, notary public in and for the parish of Orleans, State of Louisiana, duly commissioned and qualified, do certify that I caused said Jules C. Denis and Jules Traine, witnesses, hereinbefore named, to appear before me at the time and place above named, and after publicly and solemnly swearing each separately to tell the truth, the whole truth, and nothing but

81 the truth, in answer to the annexed interrogatories, I then and there proceeded to examine each separately, by propounding to him said interrogatories, and causing his answers thereto to be reduced to writing by my clerk, in my presence and that of each witness, whom I then caused to sign his respective depositions. And I further certify that the witness Edgar Pitot is dead.

In witness whereof, I have hereunto set my hand and official seal this twelfth day of November, A. D. 1874.

[SEAL.] J. G. EUSTIS, *Not. Pub.*

Notary charges, postage, &c., $10.50, paid by plaintiff.

J. G. EUSTIS, *Not. Pub.*

82 P. GILFOIL IN ACCOUNT WITH W. A. GORDON & CASTILLO.

1857.			
Mch. 24	Your draft on Fridlander Gerson, assumed by us.	$269	68
" "	Paid notarial fees for protesting same	3	06
June 28	Paid draft per Parmele & Bro	115	75
July 7	Invoice of this date for Vicksburg	77	54
" 23	Paid freight pr Vicksburg	6	38
Aug. 18	Invoice of this date pr Grand Duke	78	72
" 31	Paid freight pr Grand Duke	4	00
Oct. 12	Paid draft, your order	100	00
" 19	Draft per S. S. Whitehead, due 4 Jan., 1860	250	00
Nov. 2	Paid draft per Jno. Gleason	25	00
" 17	Invoice of this date pr Vicksburg	53	83
" 26	Paid freight pr Vicksburg	2	25

Nov. 28	Paid draft per B. & G. Moss	15	00
" "	Paid " " "	60	00
Dec. 3	Draft per F. & G. Atwood, due 4 Jan., '60	189	00
" 8	Invoice of this date pr Vicksburg	35	28
" 15	Cash paid you	100	00
" 16	" " "	50	00
" 17	Paid draft per Pinckard, Steet & Co	109	52
" 26	Draft, your order, due 19 Dec., 1860	1650	00
" "	" per M. H. Riggs, due 1—4 Jan., 1860	147	50
" "	Commission, 2½ per cent. on $1,797.50	44	95
1860.			
Jan. 2	Paid draft per F. M. Jackson	55	00
" 4	Paid " Wm. Cohn	100	00
" 12	Paid " J. C. Cavelier	425	77
" 13	Paid " Isaac Grensberg	88	79
" 16	Paid " Mrs. Ross	63	00
" 20	Difference of interest to your debt	31	72
1859.	*Credit.*		
Oct. 8	Net proceeds 8 bales cotton	340	79
1860.			
Jan. 20	Balance	2160	95
" "	Am't of drafts to new acc't	1650	00
		4151	74
83	Balance to your debit, cash, this day also	2160	95
	Your draft carried from old acc't	1650	00

New Orleans, Jan'y 20, 1860. The foregoing account is true and correct. J. E. DENIS.

Sworn to and subscribed before me this 11th day of Nov., A. D. 1874. [SEAL.] J. G. EUSTIS, *Not. Pub.*

Exhibit No. 1.—*J. G. Eustis, Not. Pub.*

P. GILFOIL IN ACCOUNT WITH W. A. GORDON & CASTILLO.

1860.			
Jan. 20.	To Balance, as per acc't rend'd	$2160	95
" "	" Draft transferred from old acc't	1650	00
Feb. 9	" Invoice of this date pr Vicksburg	45	97
" 13	" Paid draft per Sarterms & Seeleg	279	49
" "	" Paid protest on same	3	06
" 15	" Paid draft per L. Bowers	49	95
" "	" Your note, our order, due Jan'y 2, 1861	1500	00
" "	" Interest on above note	161	26
" "	" Commission, 2½ per cent. on $1,500	37	50
" 18	" Paid draft per R. G. Breading	427	75
Mch. 8	" " " Sabastian & Co	486	00
" 14	" Difference of interest to your debit	22	54

1860.		*Credit.*	
Feb. 15	By your note, our order, due Jan'y 2, 1861.....	1500 00	
Mch. 8	" Net proceeds 39 bales cotton.....	1222 72	
" 14	" Your draft due 16–19 Dec., 1860, transferred to new acc't.....	1650 00	
" "	" Your note due 2 Jan'y, 1861, transferred to new acc't.....	1500 00	
" "	" Balance.....	951 75	
		6824 47	
84	Balance to your debit, cash, this day.....	951 75	
	And also the following: Your draft due 16–19 Dec., 1860.....1650 75		
	Your note due 2 Jan'y, 1861..... 1500 75—3150 75		

New Orleans, March 14th, 1860. The foregoing account is true and correct. J. C. DENIS.

Sworn and subscribed before me this 11th day of November, 1874.
[SEAL.] J. G. EUSTIS, *Not. Pub.*

Exhibit No. 2.—J. G. Eustis, Not. Pub.

P. GILFOIL IN ACCOUNT WITH W. A. GORDON & CASTILLO.

1860.		
Mch. 14	To Balance to your debit, cash, this day per acc't received.....	$951 75
" 28	" Paid draft per Vallandingham.....	30 75
Ap'l 26	" Invoice per st. Vicksburg.....	247 37
May 31	" " " "	24 48
June 7	" Paid freight per "	10 50
July 11	" Difference of interest to your debit this day	28 34
	Balance to your debit, cash, this day.....	1293 19
	And also the the following:	
	Your draft due 10–19 Dec., 1860.....1650 00	
	" note " 2 Jan'y, 1861.....1500 00—3150 00	

New Orleans, 11th July, 1860. The foregoing account is true and correct. J. E. DENIS.

Sworn to and subscribed before me this 11th day of November, 1874. J. G. EUSTIS, *Not. Pub.*

85 *Exhibit No. 3.—J. G. Eustis, Not. Pub.*

Mr. P. GILFOIL IN ACC'T WITH W. A. GORDON & CASTILLO.

1860.			
July 11	To Balance to your debit cash this day.....		$1293 19
" "	" Comm. on your notes, $1850 @ 2½ per ct...		46 25
" "	" Interest " " " " " ...		216 86
" 27	" Paid draft per L. Crandell.....	$437 00	
" "	" " protest on same.....	4 10—	441 10

Aug. 29	To Invoice per Vicksburg	172 24
Sept. 8	" Paid freight per Vicksburg	11 93
Oct. 26	" Invoice per Jas. Woods	74 51
Nov. 22	" Difference of interest to your debit this day..	6 66

1860. *Credit.*

July 11	Your note due 12–15 April, 1861....	$1350 00	
" "	Your note due 11–14 March, 1861...	500 00	—1850 00
	Balance to your debit cash this day		412 74
	And also the following:		
	Your note due 2d Feb'y, 1861		1500 00
	Your draft due 16–19 Dec., 1860		1650 00
	Your note due 12–15 April, 1861		1350 00
	Your note due 11–14 March, 1861		500 00
			$5000 00

New Orleans, 22d November, 1860. The foregoing account is true and correct. J. E. DENIS.

Sworn to and subscribed before me this 11th day of November, A. D. 1874. J. G. EUSTIS, *Not. Pub.*

Exhibit No. 4.—J. G. Eustis, Not. Pub.

86 P. GILFOIL, ESQ., IN ACCOUNT WITH W. A. GORDON & CASTILLO.

1860.		
Nov. 22	Balance to your debit cash this day	412 74
" 30	Invoice of this date	46 17
Dec. 1	Paid draft per J. L. Crandell	70 03
" 12	Invoice of this date	62 24
" 19	Paid your note due this date	1782 00
" 27	Paid freight pr Mary Keene	4 95
1861.		
Feb. 2	Paid your note due this day	1500 00
" 4	Invoice of this date	45 44
Mch. 14	Paid your note due this day	500 00
April 15	" " " " " "	1350 00
June 29	Paid freight pr Quitman ($4.00) and M. E. Keene ($2.75)	6 75
" 14	Invoice of this date	146 50
" 11	Interest on your note, $275, due 19 Nov., '61..	
July 16	Comm. on note, $908.30, due 19 Jan., 1862....	
	" " " $2000.00, " " Feb., "	
	" " " $1500.00, " 20 Dec., 1861....	
	$4408.30, at 2½ per cent.	112 70
" "	Interest on same	395 23
Oct. 3	Invoice of this date	86 54

Oct. 16	Paid freight pr Vicksburg	4	38
" 7	Interest on note, $100, due 10 March, 1862	5	16
" 24	Difference of interest to your debit	142	86

1860. *Credit.*

Dec. 26	Net proceeds 17 b–c cotton	455	08
" " " "	5 " "	218	09
Jan. 19	" " 8 " "	274	22
" " " "	8 " "	302	34
Feb. 26	" " 11 " "	451	40
June 11	Your note due 19 Nov., 1861	275	00
May 16	" " " 19 Jan'y, 1862	908	30
" " " "	" 19 Febr'y, 1862	2000	00
May 16	Your note due 20 Dec., 1861	1500	00
87 Oct. 7	" " " 10 M'ch, 1862	100	00
" 25	Balance to your debit cash this day	207	77
	$6692.20	6692	20
Oct. 25	Balance to your debit cash this day	207	77
	Also the following:		
	Your note due 19 Nov., 1861	275	00
	Amount forward	275	00
	Amount forward	275	00
	Your note due 20 Dec., 1861	1500	00
	" " " 19 Jan'y, 1862	908	30
	" " " 19 Feb'y, 1862	2000	00
	" " " 10 M'ch, 1862	100	00
		$4783	30

New Orleans, 25th Oct., 1861. The foregoing account is true and correct. J. E. DENIS.

Sworn to and subscribed before me this 11th day of November, A. D. 1874. [SEAL.] J. G. EUSTIS, *Not. Pub.*

Exhibit No. 5.—J. G. Eustis, Not. Pub.

P. GILFOIL IN ACC'T WITH W. A. GORDON & CASTILLO.

1861.			
Oct. 25	Balance to your debit cash this day	207	77
" "	Account of Mrs. Horton transferred this day	46	81
" 31	Invoice of this date	20	99
Nov. 30	Paid freight per Vicksburg	1	00
Dec. 20	" " " Pargond	1	00
Nov. 19	Paid your note due this date	275	00
1862.			
Sept. 1	Commission on $547.55, @ 2½ per cent	13	68
1865.			
July 31	Difference of interest to your debit, at 8 per ct.	59	83

88 *Credit.*

1862.			
Sept. 1	Sales 11 bales cotton.....	$547	55
	Balance to your debit cash this day.....	78	53
	And the following:		
	Your note due 20 Dec., 1861	$1500	00
	" " " 19 Feb'y, 1862.....	2000	00
	" " " 10 April, 1862.....	100	00
	" " " 19 April, 1862.....	908	30
		$4508	30
		78	53
		$4586	83

New Orleans, 31st July, 1865. The foregoing account is true and correct. J. E. DENIS.

Sworn to and subscribed before me this 11th day of November, 1874. J. G. EUSTIS, *Not. Pub.*

Exhibit "A."—J. G. Eustis, Not. Pub.

(Endorsed:) No. 772; 13th District Court, Madison parish; Mrs. M. C. Gordon *vs.* Patrick Gilfoil, J. H. Gilfoil, int'r; Deposition on the part of the plaintiff, received and filed Nov. 14th, 1874; J. W. Bruton, d'y cl'k.

89 Act of mortgage, "C" and "E," (exhibit "A,") is transcribed at page 5 of this transcript.

Petition in suit No. 572, "D," (exhibit "F,") is transcribed at page 28 of this transcript.

Notes F (exhibits "B," "C," "D," "E") are transcribed as follows: Exhibits "B" and "C" at page 11, and exhibits "D" and "C" at page 12, of this transcript.

Order of seizure and sale, "G," (exhibit "G,") is transcribed at page 32 of this transcript.

MARY CARTWRIGHT, wife of WM. ALEX. GORDON, *vs.* PATRICK GILFOIL. } Seizure and Sale. District Court, Parish of Madison.

In this case, it is ordered that the plaintiff, Mrs. Mary Cartwright, wife of Wm. Alex. Gordon, be, and she is, authorized to institute and prosecute this suit, and to appear in court if necessary for that purpose.

Done and signed in Chambers this 9th day of February, 1869.

WADE H. HOUGH.
Judge 13th District.

90 The above judgment is this day satisfied to the extent of six hundred dollars ($600). Delta, La., July 3d, 1869.

E. D. FARRAR, *Att'y.*

(Endorsed:) No. 572, N. S., Thirteenth Judicial District, parish of Madison; Mary Cartwright, wife of Wm. Alex. Gordon, *vs.* Patrick Gilfoil; Order of Seizure and Sale; Filed February 12th, 1869; S. S. Prentiss Dangerfield, clerk; A. R. Hynes and E. D. Farrar, att'ys.

Notice of Order of Seizure and Sale, "H."

MARY CARTWRIGHT, wife of WM. ALEX. GORDON, *vs.* PATRICK GILFOIL. } State of Louisiana, Parish of Madison, Thirteenth District Court.

To Patrick Gilfoil, residing in said parish and State.

Take notice: An order for a writ of seizure and sale has been granted, in the words and figures following, to wit: Upon reading and considering the within petition, notes, and authentic documents annexed, and the law and the evidence being in favor of the plaintiff, Mary Cartwright, wife, &c., and against the defendant, Patrick Gilfoil, it is therefore, and by reason thereof, ordered, adjudged, and decreed that the confession of judgment contained in the act
91 of mortgage be made executory, and that an order of seizure and sale issue and the property hypothecated in said mortgage, to wit: "A certain tract of land, established and cultivated as a cotton plantation, situate, lying, and being in the parish of Madison, in this State, consisting of the southeast quarter of section fifth-eight (58), in township 18 of range 13 east, in district of lands north of Red River, La., containing one hundred and sixty acres, and bounded north and west by lands of W. R. Peck, and south and east by lands of Mrs. W. F. Bledsoe, together with all the buildings and improvements on said land, the stock, implements, and appurtenances thereunto belonging," be seized and sold according to law to satisfy said judgment, and all costs of these proceedings.

And unless the demand of plaintiff is complied with within the legal delays, the said property will be sold according to law.

Witness the Hon. Wade H. Hough, judge of said court, [SEAL.] and the impression of the seal thereof, at Delta, La., this the 13th day of February, A. D. 1869.

S. S. PRENTISS DANGERFIELD.

Clerk of said Court.

92 Received March 25th, 1869; served same day and month and year. By FRANK PURNELL, *D'y Sh'ff.*

JOHN A. McDONOUGH, *Sheriff.*

Serving citation and petition, $1.00; mileage, $3.50=$4.50.

(Endorsed:) No. 572, N. S.; Notice of Order of Seizure and Sale; Original filed April 6th, 1869; S. S. Prentiss Dangerfield, clerk.

Judgment (exhibit "W") is transcribed at page 45 of this transcript.

Orders of Appeal, F, pp. 5.

MRS. M. C. GORDON
vs.
PATRICK GILFOIL, JAS. H. GILFOIL, Int'r. } No. 772.

In this case, on motion of E. D. Farrar, counsel for plaintiff, made in open court, counsel for defendant and intervenor being present, taking cognizance thereof, it was ordered, that an appeal be granted to said plaintiff from the judgment herein, returnable to the Supreme Court, sitting at New Orleans, La., on the second Monday of February, 1875, for this district, upon plaintiff entering into bond
93 in the sum of one hundred dollars for a devolutive appeal and conditioned according to law for a suspensive appeal.

MRS. M. C. GORDON
vs.
PATRICK GILFOIL, JAS. H. GILFOIL, Int'r. } No. 772.

In this case, on motion of H. R. Morrison, counsel for def't, made in open court, plaintiff's and intervenor's att'ys being present, taking cognizance thereof, it was ordered, that an appeal be granted to said defendant from the judgment herein, returnable to the Supreme Court, sitting at New Orleans, La., on the second Monday of February, 1875, for this district, upon defendant entering into bond in the sum of one hundred dollars for a devolutive appeal and conditioned according to law for a suspensive appeal.

Appeal Bond.

MARY C. GORDON
vs.
PATRICK GILFOIL,
JAS. H. GILFOIL, Int'r. } State of Louisiana, Thirteenth District Court, Parish of Madison.

94 Know all men by these presents, That we, James H. Gilfoil, administrator of the estate of Patrick Gilfoil, deceased, principal, and W. R. Stone, surety, are held and firmly bound unto Patrick J. Watson, clerk of the 13th District Court for the parish of Madison, and his successor in office, in the just and full sum of one hundred ($100) dollars, for the payment of which well and truly to be made we hereby bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Witness our hand this 28th day of November, A. D. 1874.

The condition of the above obligation is such, that whereas a final judgment was rendered in the above-entitled suit in favor of the said Mary C. Gordon, plaintiff, and against the said James H. Gilfoil, adm'r of succession of P. Gilfoil, defendant, from which judgment so rendered the said James H. Gilfoil, administrator, &c., has taken a suspensive and devolutive appeal to the Supreme Court of Louisiana, returnable on the second Monday of February, A. D. 1875, into said court sitting in the city of New Orleans:

Now, if the said James H. Gilfoil, administrator of the
95 succession of P. Gilfoil, shall prosecute his said appeal with effect, or shall pay and satisfy such judgment as may be rendered against him if he be cast in said appeal, or if the same shall be satisfied by the proceeds of the sale of his estate, real or personal, then this obligation to become null and void; otherwise to be and remain in full force and effect.

Attest:
J. C. JONES.
E. T. ROE.

J. H. GILFOIL,
Adm'r of Est. of P. Gilfoil, dec'd.
W. R. STONE.

(Endorsed:) 772; Appeal Bond, filed Dec. 1st, 1874; J. W. Bruton, d'y cl'k.

Appeal Bond.

MARY C. GORDON
vs.
PATRICK GILFOIL,
JAS. H. GILFOIL, Int'r.

State of Louisiana, Thirteenth District Court, Parish of Madison.

Know all men by these presents, That Mary C. Gordon, principal, and Edgar D. Farrar, surety, are held and firmly bound unto P. J. Watson, clerk of said court, and his successors in office, in the just and full sum of one hundred dollars, for the payment of which
96 well and truly to be made we hereby bind ourselves, our heirs, executors, and administrtors, jointly and severally, firmly by these presents. Witness our hands this 11th day of Dec., A. D. 1874.

The condition of the above obligation is such, that whereas a final judgment was rendered in the above-entitled suit in favor of the said M. C. Gordon and J. H. Gilfoil, int'r, and against the said Mary C. Gordon as to the intervention, from which judgment so rendered the said Mary C. Gordon has taken a devolutive appeal to the Supreme Court of Louisiana, returnable on the second Monday of February, A. D. 1875, unto said court sitting in the city of New Orleans:

Now, if the said Mary C. Gordon shall prosecute this said appeal with effect, or shall pay and satisfy such judgment as may be rendered against her if she be cast in said appeal, or if the same shall be satisfied by the proceeds of the sale of her estate, real or personal, then this obligation to become null and void; otherwise to be and remain in full force and effect.

Attest:
J. W. BRUTON,
D'y Cl'k.

MARY C. GORDON,
By E. D. Farrar, Att'y.
E. D. FARRAR.

97 (Endorsed:) Appeal bond, 772; filed Dec. 11, 1874; J. W. Bruton, d'y cl'k.

STATE OF LOUISIANA, *Parish of Madison.* } 13th District Court, Clerk's Office.

I, Patrick J. Watson, clerk of said court, do hereby certify that

the foregoing fifty-nine pages contain a true and correct transcript of all the proceedings, as well as of all the documents filed in the suit, all orders of court, and all the evidence adduced upon the trial of the suit styled Mary C. Gordon *vs.* Patrick Gilfoil, J. H. Gilfoil, int'r, and No. 772 on the docket of this court.

[SEAL.] Witness my signature and official seal of office, at Delta, La., this 11th day of Dec., A. D. 1874.

(Signed) P. J. WATSON,
Clerk of said Court.

The above transcript is endorsed: Mrs. M. C. Gilfoil *vs.* Patrick Gilfoil, J. H. Gilfoil, int.; No. 5665; Supreme Court of La., Feb. 11, 1875; (Signed) M. P. Julian, d'y cl'k.

98 *Hearing and Submission of Cause.—Extract from the Minutes of November* 15, 1877.

M. C. GORDON
vs.
J. H. GILFOIL.

99 This cause came on for trial before the court, the parties having, in writing, waived the jury,—H. B. Kelly, for plaintiff, S. R. & C. L. Walker, for defendant,—when, after hearing the pleadings and evidence, the court took time to advise, three days being allowed the attorneys to submit briefs.

Judgment.—Extract from the Minutes of January 4th, 1878.

MARY C. GORDON
vs. No. 7956.
J. H. GILFOIL.

A trial by jury having been waived, in writing, and the cause submitted, after argument of counsel, on consideration whereof it is ordered, adjudged, and decreed that there be judgment for the defendant, with costs.

Motion for New Trial.—Entered and Filed January 7th, 1878.

MARY C. GORDON
vs. No. 7956.
JAS. H. GILFOIL.

To the Hon. the Judges of the Circuit Court of the U. S., Dist. of La:

100 On motion of Kelly & Lazarus, of counsel for plaintiff herein, and on suggesting to the court that there is error in the judgment rendered in this cause, on the ground following, to wit:

1st. That the judgment is contrary to the law and the evidence;

2d. That the court erred in decreeing that prescription was not

interrupted by the executory proceedings in the State Court, because it was decided that the seizure thereon was not a valid seizure; that under the jurisprudence of La., prescription was interrupted by the service of notice of the order of seizure and sale on Patrick Gilfoil, as shown in the transcript of the proceedings in the State Court, in evidence here by agreement of counsel;

It is ordered that Sam'l R. & C. L. Walker, attorneys for defendant, do show cause, on Saturday, Jan'y the 19th, 1878, at 11 A. M., why a new trial should not be granted on the above grounds.

Marshal's Return.

Received Jan'y 8th, 1878, by the U. S. marshal, and on the
101 9th day of Jan'y, 1878, served a true copy of the within rule on S. R. & C. L. Walker, Esq'res, by handing the same to S. R. Walker, Esq., in person, in this city.

(Signed) J. WHARTON, *D'y Marshal.*

Submission of Rule.—Extract from the Minutes, Jan'y 19th, 1878.

MARY C. GORDON
vs.
JAMES H. GILFOIL. } No. 7956.

The rule for a new trial came on to be heard, and having been argued by Kelly & Lazarus, for mover, and S. R. & C. L. Walker, for defendant in rule, the court took time to advise.

Order: New Trial refused.—Extract from the Minutes of Jan'y 22, 1878.

MARY C. GORDON
vs.
JAMES H. GILFOIL. } No. 7956.

The court having duly considered the motion for a new
102 trial and the argument of counsel thereon, does now order that the motion be dismissed, and a new trial refused, with costs.

Judgment.—Extract from Judgment Book.

Circuit Court of the United States, fifth circuit and district of Louisiana, November Term, 1877. New Orleans, Friday, January 4th, 1878. Court met pursuant to adjournment. Present: Hon. E. C. Billings, district judge.

MARY C. GORDON
vs.
J. H. GILFOIL. } No. 7956.

A trial by jury having been waived, in writing, and the cause submitted, after argument of counsel, on consideration whereof it is ordered, adjudged, and decreed that there be judgment for the defendant, with costs.

Judgment rendered, January 4, 1878.
Judgment signed, January 23, 1878.
(Signed) EDWARD C. BILLINGS, *Judge.*

Motion and Order for Appeal.—Entered and Filed February 23d, 1878.

MRS. MARY C. GORDON
103 *vs.* } No. 7956.
JAMES H. GILFOIL.

In the Circuit Court of the United States for the District of Louisiana.

On motion of Kelly & Lazarus, of counsel for plaintiff, it is ordered that the plaintiff be allowed an appeal to the Supreme Court of the United States from the final decree herein, on her giving bond for costs, with good and sufficient surety, in the sum of two hundred and fifty dollars.

Bond for Appeal.—Filed March 11th, 1878.

United States of America: Know all men by these presents, That we, Mary C. Gordon, herein authorized and assisted by her husband, Wm. Alex. Gordon, as principal, and C. E. Feinour, as surety, are held and firmly bound, jointly and severally, unto James H. Gilfoil in the sum of two hundred and fifty dollars, lawful money of the United States of America, to be paid to the said James H.
104 Gilfoil and F. A. Woolfley, clerk of the Circuit Court of the U. S. for the District of Louisiana, his heirs, executors, administrators, and assigns, for which payment well and truly to be made we bind ourselves, and each of us by himself, and each of our heirs, executors, and administrators, firmly by the presents. Sealed with our seals, and dated the eighth day of March, in the year of our Lord eighteen hundred and seventy-eight.

Whereas the said Mrs. Mary C. Gordon has obtained from the honorable the Circuit Court of the United States for the fifth circuit, holding sessions in and for the district of Louisiana, an order of appeal from the final decree rendered by said court in the suit of Mrs. Mary C. Gordon *vs.* James H. Gilfoil, No. 7956 of the docket:

Now, the condition of the above obligation is, that we, the above bounden Mary C. Gordon and C. E. Feinour, will well and pay to the said James H. Gilfoil and F. A. Woolfley, clerk of the Circuit Court of the United States for the district of Louisiana, the defendant in said suit, all such costs as he may recover against us, in case it should be decided that the said appeal was wrongfully ob-
105 tained.

(Signed) E. C. FEINOUR. [L. S.]
(Signed) M. C. GORDON. [L. S.]
Authorized by me. (Signed) W. ALEX. GORDON.
Signed, sealed, and delivered in presence of
(Signed) HENRY B. KELLY.

Bond approved March 11th, 1878.
(Signed) EDWARD C. BILLINGS, *Judge.*

E. C. Feinour, being sworn, says: That he resides in the city of New Orleans, and that he is worth the sum of two hundred and fifty dollars over and above his debts and liabilities.

(Signed) E. C. FEINOUR.

Sworn to and subscribed before me this 11th March, 1878.

[SEAL.] (Signed) THEO. GUYOL, *Notary Public.*

106 United States of America, Circuit Court of the United States, Fifth Circuit and District of Louisiana.

CLERK'S OFFICE.—I, Francis A. Woolfley, clerk of the Circuit Court of the United States for the fifth circuit and district of Louisiana, do hereby certify that the foregoing 105 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of Mary C. Gordon *vs.* James H. Gilfoil, No. 7956 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of [SEAL.] New Orleans, this 30th day of March, A. D. 1878.

F. A. WOOLFLEY, *Clerk.*

I, Edward C. Billings, United States judge for the district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the Circuit Court of the United States for the fifth circuit and district of Louisiana, was at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 30th day of March, A. D. 1878.

EDWARD C. BILLINGS, *Judge.*

107 The United States of America, Circuit Court of the United States, District of Louisiana: The President of the United States to James H. Gilfoil, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a motion and an order for appeal entered and filed in the clerk's office of the Circuit Court of the United States for the fifth circuit and district of Louisiana, wherein Mary C. Gordon, wife of William Alexander Gordon, is plaintiff and appellant, and you are defendant and appellee, to show cause, if any there be, why the judgment rendered against the said Mrs. Gordon, as in said motion for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 12th day of March, in the year of our Lord one thousand eight hundred and seventy-eight.

EDWARD C. BILLINGS, *Judge.*

108 (Endorsed:) United States Circuit Court; No. 7956; Mrs. Mary C. Gordon *vs.* James H. Gilfoil; Citation of Appeal. *Marshal's Return:* Received Mar. 12, 1878, by the U. S. marshal, and on the 1st day of April, 1878, served a true copy of the within citation of appeal on James H. Gilfoil, defendant and appellee herein, through Sam'l R. & C. L. Walker, attorneys of record, by handing the same to Sam'l R. Walker, Esq., in person, in the city of New Orleans. W. G. ELLIOTT, *D'y U. S. Marshal.*

On this 1st day of April, 1878, personally appeared before me William G. Elliott, a deputy U. S. marshal for the district of Louisiana, and makes oath that he served a copy of the citation on James H. Gilfoil through Sam'l R. & C. L. Walker, as stated in his official return hereon. W. G. ELLIOTT, *D'y U. S. Marshal.*

Sworn to and subscribed before me this 1st day of April, 1878.
F. B. VINOT, *U. S. Comm'r.*

SUPREME COURT

OF THE UNITED STATES.

No. ——.

MRS. MARY C. GORDON, APPELLANT,

versus

JAMES H. GILFOIL, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF LOUISIANA.

Brief for Plaintiff and Appellant.

HENRY B. KELLY,
HENRY L. LAZARUS,
of counsel.

L. McGrane, print, 23 Commercial Place.

SUPREME COURT

OF THE UNITED STATES.

No. ——.

MRS. MARY C. GORDON, APPELLANT,

versus

JAMES H. GILFOIL, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF LOUISIANA.

Brief for Plaintiff and Appellant.

This is a suit, *via ordinaria*, on promissory notes of Patrick Gilfoil, secured by mortgage on real estate in Louisiana, which seeks the foreclosure of the mortgage, and also a decree against the defendant, James H. Gilfoil, personally, on the ground that he has, under the laws of Louisiana, made himself personally liable for the debts of Patrick Gilfoil, by taking possession, as his sole heir, of his entire estate. In accordance with the doctrine laid down by this Court in Walker vs. Dreville, 12 Wallace, 442, the suit is to be regarded as a chancery cause, and the decree of the Circuit Court, which was in favor of the defendant, has been brought here for review by appeal.

The petition avers, in substance, that plaintiff is the holder of four promissory notes, for specified amounts, two maturing on the 1st of January, 1868, and two on the 1st of January, 1869, secured by mortgage on a certain plantation in the parish of Madison; that said notes and mortgage were made and

executed by Patrick Gilfoil, of the parish of Madison, now deceased, and that James H. Gilfoil is his sole heir and has made himself personally liable by taking possession of the entire estate; that in the suit styled Mary Cartwright, wife of Wm. Alexander Gordon, vs. Patrick Gilfoil, No. 572, N. S., of the District Court for the parish of Madison, she obtained, upon said notes and mortgage, an order of seizure and sale, which she attempted but failed to execute, in consequence of the sheriff not performing his duty; that this order of seizure and sale was obtained on the 13*th of February*, 1869, *and has never been annulled;* that said notes still remain due and unpaid, notwithstanding amicable demand on said James H. Gilfoil.

The petition prays that James H. Gilfoil be cited, and for judgment in favor of plaintiff against him for the amount of said notes, interest and costs, with mortgage lien and privilege on the property described.

To this petition defendant excepted on the grounds: 1. That the petition disclosed no cause of action. 2. That plaintiff, having elected to sue in the State Court, and jurisdiction having vested there, this Court was without jurisdiction. 3. That the obligations sued on are prescribed by the lapse of more than five years.

The first exception is tantamount to a general demurrer to the whole bill; the second to a special plea to the jurisdiction, and the third to a plea of the statute of limitations. If dealt with according to the requirements of the rules of equity pleading, the demurrer is overruled by the pleas and the plea to the jurisdiction by pleading to the merits by demurrer and plea of the statute of limitations.

These exceptions having been referred to the merits, plaintiff filed a supplemental petition averring that the legal proceedings taken by her in her attempt to enforce her claim, by order of seizure and sale, in said suit No. 572, were sufficient under the laws and jurisprudence of Louisiana to interrupt and suspend prescription upon the notes herein sued upon, and that under the laws of Louisiana an heir who takes possession of

the property of an estate becomes bound for the debts of the deceased, and that the defendant, James H. Gilfoil, has taken possession of the estate and property of Patrick Gilfoil, his deceased father.

Defendant answered, in substance, by a general denial,—a special denial that plaintiff was holder of the notes sued on,—and a special averment that the said notes were filed and sued on in said suit No. 572, and were *merged and extinguished* in the order of seizure and sale in that case, and cannot be again sued on, and that "as *said proceedings have never been discontinued*, this Court is without jurisdiction in the premises."

A supplemental and amended answer was afterwards filed setting forth, in substance, that the defendant is by inheritance from his deceased mother the legal owner and possessor of one undivided half interest of the plantation mortgaged to secure the notes, and is the legal possessor and administrator of the other half, as coming into his ownership and possession from the succession of his deceased father, Patrick Gilfoil, who died about the month of September, 1872; and defendant denies specially that he has taken such possession as would make him personally liable for any debt or mortgage claimed against the succession of said Patrick Gilfoil.

That respondent, as administrator and sole beneficiary heir of said Patrick Gilfoil, deceased, became the possessor, and has now, and has had, the possession of the undivided one-half of said tract of land belonging to the succession of his said deceased father.

The supplemental answer then sets forth, again, the institution by plaintiff of said executory proceedings No. 572 in February, 1869, reiterates the statement that the mortgage notes were merged in the order of seizure and sale granted upon them in that proceeding, and specially avers "that the urisdiction of said executory proceeding or suit *is still vested in said State Court*," from which, it is alleged, it has never been jdivested by any process known to law.

It then sets forth at length, and with great particularity of detail, the pleadings, proceedings and judgments in a certain suit instituted by the plaintiff in January, 1872, against Patrick Gilfoil, in the District Court for the parish of Madison, No. 772, of the docket of that Court, afterwards appealed to, and finally decided by, the Supreme Court of Louisiana.

With regard to this suit, it appears from the face of the record referred to by the supplemental answer, that under the writ of seizure and sale issued at the suit of Mrs. Mary C. Gordon vs. Patrick Gilfoil, in the proceeding No. 572, before referred to, the property covered by the mortgage was advertised and sold by the sheriff, and adjudicated to Mrs. Gordon, the plaintiff in the writ, for a sum much less than the amount of the writ; and that the property was conveyed to her by sheriff's deed, in accordance with the terms of adjudication; but that the sheriff did not deliver possession of the property to her, and that the suit No. 772 was brought by her, upon the sheriff's deed, against Patrick Gilfoil to obtain possession of the property, as owner thereof. That Patrick Gilfoil, in his defence, alleged the nullity of the sheriff's sale, on the ground that no proper notice of seizure had been given, but more especially on the ground *that no actual seizure* of the property sold had been made by the sheriff.

That *on the 23d of May*, 1872, the present defendant, James H. Gilfoil, intervened in said suit, claiming that, at the date of the execution of the mortgage by Patrick Gilfoil, under which the property had been sold to Mrs. Gordon, he, the said Patrick Gilfoil, was the owner of only one undivided half of said property, and that he, the said James H. Gilfoil, was the owner of the other undivided half, by inheritance from his deceased mother.

It further appears that after James H. Gilfoil had intervened in said suit, the defendant, Patrick Gilfoil, died, and that on the 4th day of April, 1874, Mrs. Gordon filed a supplemental petition in said suit, setting forth the death of Patrick Gilfoil, and that James H. Gilfoil was in possession of the property

sued for, and had been in possession thereof ever since the death of said Patrick Gilfoil, and refused to surrender the same; that whatever succession was left by said Patrick Gilfoil at his death had been taken possession of by said James H. Gilfoil without any process of law, and used for his own purposes, whereby he rendered himself liable personally for all the debts of the succession; and it was prayed that said James H. Gilfoil be made a party defendant, and that judgment be rendered against him as prayed for against Patrick Gilfoil in the original petition.

To this supplemental petition James H. Gilfoil answered by a general denial, and a special denial that any legal sale was ever made of said land, averring that the sale pretendedly made was illegal, null and void, because no notice of such order of seizure and sale was ever served on P. Gilfoil, and because there was no legal seizure advertisement or appraisement, and that the sale was null as to James H. Gilfoil, because he was no party to the proceedings.

In this answer of James H. Gilfoil, filed *November* 21, 1874, it is furthermore expressly averred that *he was only possessed to the extent of his own one-half interest as claimed by him as heir to his mother.*

Upon these pleadings, after due proceedings, judgment was pronounced in the District Court recognizing and confirming Mrs. Gordon's title to one undivided half of the property, by virtue of her purchase at sheriff's sale, and recognizing the title of James H. Gilfoil to the other undivided half by right of inheritance from his mother. From this judgment an appeal was taken to the Supreme Court of the State, and the decision of that tribunal is to be found in 27 A., p. 265.

That court affirmed so much of the judgment of the District Court as recognized the title of James H. Gilfoil to one undivided half of the property, by right of inheritance from his mother, but reversed so much of the judgment as recognized Mrs. Gordon's title to the other undivided half, under her purchase at sheriff's sale, for the reason that that officer, instead

of making an *actual* had only made a *paper* seizure of the property.

After setting forth the pleadings, proceedings and judgments in said petitory suit No. 772, the supplemental answer avers that the judgments in said suit were "upon the same issues of facts and pleadings" as in this present cause, and formally pleads the same as *res judicata* in bar to this action. And not satisfied with having once formally interposed this plea of *res judicata* in the supplemental answer filed on March 12, 1877, the defendant's counsel *plead it again*, by a special exception filed on the 4th of June, 1877.

AGREEMENT.

By a written stipulation signed by counsel for both parties and filed June 4th, 1877, it is agreed:

That the trascript of the case of Gordon vs. Gilfoil, No. 5665, of the Supreme Court of Louisiana, and the testimony therein contained, with extracts therefrom referred to in defendant's answer, be admitted in evidence.

ARGUMENT.

The law applicable to the facts of this case will be considered with reference—

First—To the liability of James H. Gilfoil for the debts of Patrick Gilfoil.

Second—To the jurisdiction of this court as affected by the pleas of *lis pendens* and *res judicata*.

Third—To the plea of the statute of limitations, or prescription.

1. Under the laws of Louisiana when an heir takes possession of succession property, without inventory, he renders himself liable, personally, for the debts of the succession. Rev. C. C. 883, 992; 7 La. Ann. R. 553.

"Succession is the transmission of the rights and *obligations* of the deceased to the heirs." Rev. C. C. 871.

It "also signifies the estates, rights *and charges* which a person leaves after his death, whether the property exceeds the charges, or the charges exceed the property, or whether he has *only left charges without property.*" *Id.* 872.

"Finally, succession signifies, also, that right by which the heir can take possession of the estate of the deceased, such as it may be." *Id.* 874.

"No one can be compelled to accept a succession in whatever manner it may have fallen to him, whether by testament or the operation of law. He may, therefore, accept or renounce it.

"It shall not be necessary for *minor heirs* to make any formal acceptance of a succession that may have fallen to them, but said succession shall be considered as accepted for them with benefit of inventory by operation of law, and shall in all respects have the force and effect of a formal acceptance." *Id.* 977.

"He who is called to the succession being seized thereof in right, is considered the heir as long as he does not manifest the will to divest himself of this right by renouncing the succession." *Id.* 1014.

"The renunciation of a succession is not presumed; it must be made expressly by public act before a notary public in the presence of two witnesses." *Id.* 1017.

"The simple acceptance may be express or tacit.

"It is express when the heir assumes the quality of heir in an unqualified manner, in some authentic or private instrument, or in some judicial proceeding.

"It is tacit when some act is done by the heir which necessarily supposes his intention to accept, and which he would have no right to do but in his quality of heir." *Id.* 988.

"If the person called to the succession *possess himself* * * *of effects found in the succession, thinking they belong to it, he does an act which makes him liable as heir.*" *Id.* 902.

" * * If the heir who has expressly or tacitly accepted the succession, *has not put himself into possession before he has caused a true and faithful inventory to be made,* in conformity

to that which is prescribed to the beneficiary heir, he can discharge himself from paying the debts of the succession out of his own property, *by abandoning the effects of the succession* to the creditors and legatees of the deceased, and rendering them a faithful account of the same, as well as of the fruits and revenues of the same." *Id.* 1010.

"The effect of the simple acceptance of the succession, whether express or tacit, is such, that when made by an heir of age, it binds him to the payment of all debts of the succession, not only out of the effects which have fallen to him from the succession, but even personally and out of his own property, as if he had himself contracted the debts, or as if he was the deceased himself; unless before acting as heir he had made a true and faithful inventory of the effects of the succession, as herein above established, or has taken the benefit treated of hereafter." *Id.* 1013.

"The benefit of inventory is the privilege which the heir obtains of being liable for the charges and debts of a succession only to the value of the effects of the succession, by causing an inventory of the effects to be made within the time and in the manner hereinafter prescribed." *Id.* 1032.

"The heir who wishes to enjoy the benefit of inventory and time for deliberating is bound *as soon as he knows of the death* of the deceased to whose succession he is called, and *before committing any act of heirship*, to cause the seals to be affixed on the effects of the succession by the proper officer." *Id.* 1034. And see, in this connection, *Id.* 1075 *et seq.*—"Of the seals, and the affixing and raising of the same."

"*In ten days after* the affixing of the seals the heir is bound to present a petition to the judge of the place in which the succession is opened, praying for the removal of the seals, and that a true and faithful inventory of the effects of the succession be made, as hereinafter prescribed." *Id.* 1035.

"The effect of the benefit of inventory is that it gives the heir the advantage :

1. Of being discharged from the debts of the succession *by abandoning all the effects of the succession to the creditors and legatees.*

2. Of not confounding his own effects with those of the succession, and of preserving against it the right of claiming the debts due him from it." *Id.* 1054.

In the brief of defendant's counsel it is asserted, and in his pleadings it is averred that the defendant is in possession of an undivided half of the property mortgaged by his father, Patrick Gilfoil, as owner by inheritance from his mother, and of the other undivided half as administrator and *beneficiary heir* of his father.

Defendant distinctly avers that there was an inventory and letters of administration, and it was incumbent on him to substantiate the averment. *Ei incumbit probatio qui dicit, non qui negat.* Nothing could have been simpler or easier than to have made proof of the truth of the averment, if true. But not only is there no proof in the record that an inventory was made within the time and in the manner and form required by law, or that an inventory was ever made at any time, or letters of administration ever granted, but James H. Gilfoil in his answer to the supplemental petition of Mrs. Gordon, in the suit No. 772 in the State court, making him party defendant to the suit, in lieu of Patrick Gilfoil, deceased, on the allegation that he had taken possession of the estate as sole heir, *which answer was filed on the 21st of November, 1874, more than two years after the death of Patrick Gilfoil,* instead of pretending that he had come into possession of any part of the estate as beneficiary heir or administrator, distinctly disavows any such pretension by the averment "*that he was only possessed to the extent of his own one-half interest* as claimed by him as heir of his mother."

Yet on the *same day* that the above pleading was filed, on the trial of the case, the following admission was made, and is to be found at page of the transcript, which is in evidence by written agreement of counsel: "It is admitted that James

H. Gilfoil resided with his father on the place at the time of his death, and still resides there, *and has possession of the same;* that Patrick Gilfoil died October 2d, 1872."

This admission of possession by James H. Gilfoil was, as has been stated, made on the 21st of November, 1874, *more than two years* after the death of Patrick Gilfoil; it was unqualified by any reservation whatever of the possession being in the character of administrator or beneficiary heir, as is now pretended, and is in effect a direct admission of the liability of James H. Gilfoil for the debts of the succession of Patrick Gilfoil.

It is said in the brief of defendant's counsel, at page 4. "that it also appears that the defendant, James H. Gilfoil, was about nineteen years old at the time of his father's death, though *since judicially emancipated*, and that he is the sole heir of his father and mother, not unconditional, but with benefit of inventory."

As has already been stated there is not a particle of evidence before the Court to show that any inventory of the estate of Patrick Gilfoil was ever made, and as to the statement in the brief that James H. Gilfoil was a minor, about nineteen years old at the time of his death, *though since* judicially emancipated, there is not only no warrant whatever in the evidence in the record, for the latter part of the statement that James H. Gilfoil was emancipated *after* the death of his father, but it is in direct contradiction of the proof to be found there. James H. Gilfoil, it is admitted died on the 2d of October, 1872. On the 22d of May, 1872, five months prior thereto, James H. Gilfoil filed his petition of intervention in the suit No. 772, then pending in the State Court, between Mrs. Mary C. Gordon, as plaintiff, and Patrick Gilfoil, as defendant, referred to in his pleading in the Circuit Court as exhibit "M." In this petition, filed more than five months prior to his father's death, James H. Gilfoil figures not as a minor, but as person at that time *sui juris*. And in the note of evidence, at the trial of the case at the November term, 1874,

is to be found the following admission: "It is admitted that James H. Gilfoil, intervenor, was emancipated before this intervention was filed (being a minor)."

When the Court bears in mind that under the laws of Louisiana had James H. Gilfoil been an unemancipated minor at the time of the death of Patrick Gilfoil, the succession of the latter would have devolved upon him, *with benefit of inventory, by mere operation of law*, and that his emancipation after he had attained the age of eighteen years, and prior to his father's death, placed him in all respects upon the footing of a major heir, the Court will perceive the importance of the mistatement of fact on this point, made in the brief of defendant's counsel, altogether we are satisfied, through misapprehension on the part of counsel, whom we know to be incapable of intentionally misstating a matter of fact.

As to the effect of emancipation we refer the Court to Withers vs. Withers, 3 La. R. 345; Rev. Stat. of La, 1870, section 2317.

2. As to the jurisdiction of the United States Circuit Court, as affected by the pleas of *lis pendens* and *res judicata*.

The assertion at page 4 of the brief of defendant's counsel, where they say "the suit or proceeding by executory process was *terminated* by the judgment or order thereon on the 9th of February, or the service of process on the 25th of March, 1869, and if not then, was certainly terminated by the sale on the 3rd of July, 1869, when the sheriff closed his proceeding and returned the writ of executory process," is directly in the teeth of the averments of their own pleadings in the case.

In the answer, referring to those executory proceedings, it is expressly alleged that, "as said proceedings *have never been discontinued*, this Court is without jurisdiction in the premises," and in the supplemental answer it is again alleged, "that the jurisdiction of said executory proceedings is *still vested* in said State Court."

The defendant having *formally and specially pleaded the actual pendency* in the State Court of the executory proceedings

No. 552, at the time of the institution of the present suit, in the United States Court, in bar or abatement of the jurisdiction of that Court, cannot be heard now to say that those proceedings were not then pending, but were *terminated* either on the 9th of February, or 25th of March, 1869, or on the 3d of July, 1869. He cannot be permitted thus to change his ground and mend his hold. He is estopped from so doing by the record of his own plea in the cause.

An estoppel is a preclusion in law, which prevents a man from alleging or denying a fact in consequence of his own previous act, allegation or denial of a contrary tenor. Stephen's Pleadings, 239. Any confession or admission made made in pleading, in a court of record, will forever preclude the party from afterwards contesting the same fact in any subsequent suit with his adversary. Com. Dig., Estoppel A, 1. A *fortiori* he is precluded from doing it in the same suit.

When we come to discuss the plea of prescription we will show upon conclusive authority, that in the particular now under consideration, where the learned counsel in their brief attack their own pleadings, the pleadings are right and the brief wrong, and that the executory proceedings are still pending in the State court. But if the proceeding here were of the same character as the proceeding there—which it is not, the one being a suit *via ordinaria* and the other a proceeding *via executiva*—it would not support a plea to the jurisdiction of this court; for, in Stanton vs. Embree, 3 Otto, 548, it is explicitly held, that the pendency of a suit in a State court is not a bar to a subsequent suit in a Circuit Court of the United States by the same plaintiff against the same defendant for the same cause of action.

Nor is there anything in the record to support the plea of *res judicata*. The judgment in the suit for the land, in which James H. Gilfoil intervened, cannot support it, for that was a suit on a sheriff's deed, and this is a suit on promissory notes —that was a suit for land, and this a suit for money. The judgment there was, not that the mortgage notes upon which

the executory process issued were not due and exigible, but that the sale of the land under executory process was void on account of the failure of the sheriff to make an *actual* instead of a *paper* seizure of it.

To the extent to which the judgment of the Supreme Court of Louisiana recognizes the title of James H. Gilfoil, as heir of his mother, to an undivided half of the land mortgaged by his father, Patrick Gilfoil, which undivided half was not susceptible according to the views of the State court of being mortgaged by Patrick Gilfoil at the time the mortgage was granted, we accept the decision of the State court, and admit that our rights of mortgage should be limited to the undivided half of the property, which was the property of Patrick Gilfoil when the mortgage was granted.

But the defendant not only grounds his plea of *res judicata* on the judgment of the Supreme Court in the suit for the land, but also assigns as ground for the plea the order of seizure and sale in the executory proceedings, No. 552. The plea cannot be maintained on any such ground.

In Humphreys vs. Brown, 19 A. 158, it was held that the order rendered in executory process is not such a judgment as will have the effect of the thing adjudged. The court said: "The plea of *res judicata* cannot be sustained, as no issue was joined in the executory proceedings, which can have the effect of the thing adjudged; the order is granted *ex parte* on authentic evidence, and the only question which the judge examines is whether the evidence is sufficient to authorize the *fiat*."

And in Harrod vs. Voorhies, Adm'r., 16 L. 256, it is said: "Such a decree is not a judgment in the true and legal sense of the term, and possesses none of its features. It issues without citation to the adverse party; it decides no issue between the parties, nor does it adjudicate to the party obtaining it any right in addition to those secured by his notarial contract. If such an order was a real judgment, it would be out of the power of the judge granting it to set it aside; after rendering

this decree he would be divested of all jurisdiction, and it could be reversed only by an appeal or a separate action of nullity; whereas it is every day's action for the judge issuing such orders to set them aside on a rule to show cause, or on opposition; and in most cases the proceedings are turned into an ordinary suit in which a final judgment is afterwards rendered.

Such a proceeding, then, can be viewed only as giving the aid of the officers of justice to execute an obligation which, by law, produces the effects of a judgment in relation to the particular property mortgaged. The recording of it confers on the party no additional rights or lien; and should the property mortgaged be destroyed, the decree would be wholly inoperative and unavailing; the creditor would be compelled to bring suit on the evidence of his debt in order to have a judgment. Plaintiff's note and mortgage *have not merged* in the decree made on them, as they would have done in a contradictory judgment rendered by a competent court."

3. As to the plea of prescription:

We have already shown that defendant has formally and specially pleaded in this cause as a ground of exclusion of the jurisdiction of the Circuit Court, that at the time of the institution of this suit the executory proceedings, No. 552 in the State court, were still pending and had never been discontinued, and that he is estopped by his plea from saying now that they were not pending when this suit was brought.

The statutory limitation relied upon by the defendant is to be found in article 3540 of the Revised Civil Code of Louisiana, which provides that actions on promissory notes shall be prescribed by five years, reckoning from the maturity of the notes.

"*Prescription* is a manner of acquiring property or discharging debts, by the effect of time, and under the conditions regulated by law." Rev. C. Code. article 3457.

"The prescription by which debts are released, is a peremptory and perpetual bar to every species of action, real or personal, *when the creditor has been silent for a certain length of time without urging his claim.*" *Id.* art. 3459.

"There are two modes of interrupting prescription: that is, by a natural interruption or by a legal interruption." *Id.* art. 3576.

A legal interruption takes place by a judicial demand made upon the debtor; and the prescription is interrupted by such demand, whether the suit has been brought before a Court of competent jurisdiction or not. *Id.* arts. 3518 and 3551.

As under the common law and equity systems of jurisprudence and procedure, a bond and mortgage creditor may bring an action at law upon the bond and a suit in equity to foreclose upon the mortgage; so, under the jurisprudence and methods of procedure which prevail in Louisiana, a creditor holding promissory notes secured by mortgage may, at his option, proceed either *via executiva* for the seizure and sale of the mortgaged property, or *via odinaria*, upon the notes and mortgage for a personal judgment and foreclosure of mortgage.

"Civil actions may be prosecuted according to the nature of the case by three kinds of proceedings, to-wit: Ordinary, executory or summary. La. Code of Practice, art. 97.

"The proceedings are ordinary when citation takes place, and all the delays and forms of law are observed.

They are executory when seizure is obtained against the property of the debtor, without previous citation, in virtue of an act or title importing a confession of judgment, or in other cases provided by law." * * *Id.* 98.

"The executory process can only be resorted to in the following cases:

1. When the creditor's right arises from an act importing a confession of judgment, and which contains a privilege or mortgage in his favor.

2. * * *Id.* 732.

"An act is said to import a confession of judgment in matters of privilege and mortgage, when it is passed before a notary public, or other officer fulfilling the same functions, in the presence of two witnesses, and the debtor has declared or acknowledged the debt for which he gives the privilege or mortgage." *Id.* 733.

When the creditor is in possession of such an act he may proceed against the debtor, or his heirs, by causing the property subject to the privilege or mortgage to be seized and sold on a simple petition and without a previous citation of the debtor. *Id.* 734. In obtaining this order of seizure it shall suffice to give three days notice to the debtor, counting from that on which the notice is given, if he resides on the spot, adding a day for every twenty miles between the place of his residence and the residence of the judge to whom the petition has been presented. *Id.* 735.

Mrs. Mary C. Gordon instituted suit *via executiva* by filing her petition in the District Court for the parish of Madison, No. 572 of the docket of that Court, on the 9th of February, 1869, and obtained the same day an order of seizure and sale, and the service of the notice of the order required by Art. 735 of the Code of Practice, as appears by the sheriff's return, to be found at p. of the transcript, was made on the 25th of March, 1869.

It was the institution and continued pendency of these executory proceedings in the State court which were averred and specially pleaded in the Circuit Court by the defendant as a bar to its jurisdiction. The plaintiff relies upon them as having interrupted and suspended the prescription of five years, also pleaded by the defendant in bar of this suit.

Patrick Gilfoil, it is admitted in the record, died on the 2d of October, 1872, and the petition in the present suit in the Circuit Court of the United States was filed on the 19th of October, 1876, and service of citation made on James H. Gilfoil personally on the 25th of October, 1876. So that, if the court should consider, nothwithstanding the averment of the

defendant in support of his special plea that the executory proceedings were actually pending in the State court at the time of the institution of this suit in the Circuit Court, in October, 1876, that those proceedings had abated by the death of Patrick Gilfoil, on the 2d of October, 1872, still, if the court shall be satisfied that the pendency of those proceedings interrupted and suspended prescription during the life-time of Patrick Gilfoil, it must overrule the plea, for less than five years elapsed between the date of the death of Patrick Gilfoil, in October, 1872, and the service of citation on James H. Gilfoil, in the present suit, in October, 1876.

That the institution and pendency of the executory proceedings did interrupt and suspend the running of prescription up to the date of the death of Patrick Gilfoil, is clear beyond controversy upon the authority of numerous decisions of the Supreme Court of Louisiana.

The first of the notes sued on to mature fell due in January, 1868, the others in January, 1869. Executory proceedings to enforce payment were begun in the State court in February, 1869, and as is truly averred in defendant's answer, have "never been discontinued."

It has been settled by a series of decisions of the Supreme Court of Louisiana "that when a creditor whose claim is secured by mortgage may proceed against the same person by personal action or by executory proceedings, the institution of proceedings *via executiva* will interrupt prescription running against the personal action."

Stanberry vs. McCall, 4 A. 324.

Fortier vs. Zimple, 6 A. 54.

Rhea vs. Taylor, 8 A. 23.

Walker vs. Lee, 20 A. 192.

Service of notice of seizure issued in executory proceedings on defendant interrupts prescription. 20 La. Ann. 24, 192; 21 La. Ann. 32, 155; 22 La. Ann. 152; 23 La. Ann. 215, 427, 687.

The setting aside of an order of seizure and sale does not affect the petition and cannot be considered as dismissing the defendant. When the writ has expired, or the *sale under it been set aside*, an *alias* writ may issue without a new order.

7 N. S. 647; 6 A. 54, 407; 15 L. 132; 16 L. 254.

In Riddel vs. Ebinger, 6 A. 407, the court said: "The writ under which the sale was made was an *alias*, and it is contended that the order of seizure was a judgment only so far as the original writ was concerned; that it expired when the writ was returned, and no other writ could issue without a new order of court.

This objection has so often been held unfounded by our predecessors and ourselves, that we deem it unnecessary to do more than to refer to some of the cases in point. Ursuline Nuns vs. Dupassain, 7 N. S. 644; Harrod vs. Voorhies, 16 L. 256; Fortier vs. Zimpel, 6 A. 54.

In Fortier vs. Zimpel, 6 A. 54, there was an order of seizure and sale; the first writ was stayed by order of plaintiff's attorney, and on motion an *alias* writ was issued, under which the *plaintiff became purchaser of the mortgaged property. The sale was afterwards annulled* on the ground that the writ had issued for a larger amount than was really due.

Plaintiff considering the original petition still in court then applied for a *pluries* writ, which was granted, and under this writ the property was sold a second time and bought in by plaintiff. Monition was issued on this sale to which opposition was made, and the court held, citing previous decisions, that the setting aside of an order of seizure did not affect the petition, and could not be considered as dismissing the defendant, and that the petition was still in court after the judgment setting aside the sale under the *alias* writ, and that the *pluries* writ was rightfully issued. A plea of prescription having been interposed in this case, the court said: "We dismiss the plea of prescription, with a reference to the case of Stanton vs. McCall, 4 A. 322, in which we held that prescription did not attach under similar circumstances."

In Stanberry vs. McCall, 4 Ann. 326, the court said: "Can a mortgagor in possession * * pretend that prescription runs against the debt itself, while the creditor is exercising the accessory right of mortgage? This question may be answered in the language of D'Argentree, "Sed de his actionibus quae habent sese, ut accessoriæ et principales, ut personalis et hypothecaria, justa dubatio esse posset, nisi expressé de eo constitutum esset l. fin. C. de annal. Except., quâ traditur una contestatione aut citatione in altera, fieri in utraque interruptione. * *" Applying these principles to the case before us, the prescription of the personal action was interrupted by the hypothecary proceeding. * * * The rule harmonises with the theory of prescription, which has its basis in the presumption of renunciation on the part of him who neglects his rights, and which presumption cannot be entertained against a party who is struggling to collect a debt and is not *sui juris contemptor*."

It is contened by counsel for defendant at page 5 of the brief that the authorities referred to show that there was only an *interruption*, and not a *suspension* of prescription, and that being only an interruption on the 25th of March, 1869, prescription commenced to run again and was completed on the 25th of March, 1874.

If our learned brother had read those authorities with more attention he would have seen that their purport and effect are not what he states them to be, but directly to the contrary.

In Stanberry vs. McCall, 4 Ann. 327, the Supreme Court of Louisiana say:

"The interruption then created by the institution of one species of action must *also be considered as continuous and as preserving the personal action while the hypothecary action is in course of prosecution.*"

In Gaines vs. Hennen, 24 How. 553, the Supreme Court of the United States held that article 3485 of the Louisiana Civil Code, corresponding with article 3519 of the Revised Code, declares that a legal interruption of prescription shall be con-

sidered as never having happened if the plaintiff after having made his demand abandons or discontinues it, but this article contemplates a voluntary, active and intentional abandonment of the suit.

So, the Supreme Court of Louisiana, in Price vs. Emmerson, 16 A. 95, held that a judgment of nonsuit rendered on motion of defendant's counsel when counsel for plaintiff declines to go into the case, is not such an abandonment of the action as is contemplated by article 3485 of the Civil Code, and prescription is considered as *interrupted during the pendency of the action.*

If any further authority were needed upon this point, Turner vs. McMain, 29 Ann. 299, decided by the present Supreme Court of Louisiana, would certainly be conclusive against the position assumed in this particular by our learned brother of counsel for the defendant.

In this case judicial demand was made and citation served on two of the solidary debtors, in 1855, and no further steps were taken in the case for a period of eighteen years, when, in 1873, a default was taken against the debtors cited in 1855, and the other solidary debtor cited, who interposed the plea of prescription of five years, the suit being on a promissory note.

Mr. CHIEF JUSTICE MANNING delivering the opinion of the Court, on rehearing, said:

"The note sued on is a solidary obligation. Shortly after its maturity suit was instituted against all parties, but citation was served only upon McMain and W. J. Frierson, the husband of one of the obligors. Mrs. Frierson was cited December 1, 1873, and pleads prescription. This last service was nearly nineteen years after the maturity of the note.

The citation of one of the solidary debtors in 1855 interrupted prescription as to all the others. The liability of Mrs. Frierson will depend upon the question *whether this interruption lasted during the continuance of the suit?* * * *

The counsel for defendant relies on the declaration of the Code that if the plaintiff abandons or discontinues his demand the interruption shall be considered as having never happened, (R. Code Art., 3485; new No. 3519,) and while admitting that frequent decisions of this court have required that the abandonment shall be active, he insists that the conduct of the plaintiff in not calling his suit for trial from 1857, when a hearing was had and no decision made to 1873, when his client was first cited, constitutes such an abandonment as the Code has in view. In other words, that the inaction of the plaintiff is equivalent to an abandonment.

He also contends that the interruption of prescription consequent upon a citation, is the same as that produced by the acknowledgment of the debt, and that in both cases prescription begins to run again immediately, while his adversary insists that when the Code says a suit against one of the solidary debtors interrupts prescription with regard to all, it means that the interruption lasts as long as there is a suit.

The distinction between an interruption and a suspension of prescription, is clearly defined, and need not here be elaborated, since it does not enter into this case. Our inquiry is of the nature, extent and duration of the interruption produced by a suit.

Marcadé, treating of the interruption thus resulting, says:

"Et d'abord une demande en justice, l'article ne parle, il est vrai, que d'une *citation* en justice, ce que pourrait faire croire, que l'effet interruptif n'est attribué qu'à la demande formée par l'exploit introductif d'instance, mais la raison dit, et tout le monde le reconnait aujourd'hui, que toute demande en justice, *qu'elle soit formée par citation ou autrement*, interrompt la prescription. * * * * * * *

Ce n'est pas seulement pour le temps anterieur à la demande, que cette demande interrompt la prescription, c'est aussi, comme nous l'avons déjà dit, pour tout le temps que durera l'instance; en sorte qu'une prescription nouvelle ne pourra pas recommencer contre le demandeur avant le jour ou sera rendu le jugement

par lequel cette instance se terminera. Si'l en eût été autrement, si la demande, en effaçant le temps qui s'est écoulé avant elle, eût laissé la prescription nouvelle commencer à l'instant même, il s'en serrait suivi ce resultat absurde, que toutes les fois que le procés aurait duré pendant un temps plus long que le délai de la prescription applicable à l'espèce, le droit du demandeur aurait été anéanti par la prescription nouvelle avant que le jugement fut prononcé. * * * * C'est donc une profonde hérésie que celle qui donne a la demande judiciaire l'effet d'aneanéantir la prescription anterieur en laissant commencer dès le même jour une prescription nouvelle." Traité de la Prescription, page 124.

Marcadé answers the question which defendant's counsel addresses to us, Whether the plaintiff's remaining quiet for a very long period shall not legally be construed as an abandonment of his suit: "L'interruption dure tant qui dure le proces fut il quarante ans, cinquante ans et plus;" and Troplong is equally explicit: "Du reste, tant que le proces se poursuit, il n' y a pas de prescription possible; l'action durât-elle trente quarante et cinquante ans." De la Prescription, p. 298.

"We must then inquire," the court goes on to say, "if the doctrine of this court has been in accord with that announced by the French commentators." And, after reviewing all the former decisions bearing upon the question, the court, in conclusion, say: "From this review of the decisions of this court it will be seen that the interpretation of the French commentators has been adopted here from an early period, and has been consistently adhered to (unless we may except the isolated decision in Mullandon vs. Beasly), and we may therefore adopt the language of Marcadé, "de tout temps on a reconnu que du moment que les droits en actions prescriptibles sont portés devant le juge, ils ne peuvent plus périr, pas plus par une prescription nouvelle que par l'ancienne."

In accordance with the doctrines laid down by the Supreme Court of Louisiana in the cases above referred to, and specially

in Fortier vs. Zimple, 6 Ann. 54, it is evident that after the decision of the Supreme Court setting aside the sale to Mrs. Gordon, on the ground that there had only been a *paper* seizure of the property made by the sheriff, under the original writ of seizure and sale, it was perfectly competent for her to sue out an *alias*, and if necessary, a *pluries* writ in the executory proceedings, or by supplemental petition to change those proceedings into an action *via ordinaria*, and that the pendency of those proceedings interrupted and suspended the running of prescription from the date of their institution, at least until the date of the death of Patrick Gilfoil, in October, 1872, and that the present suit in the United States Circuit Court having been instituted and service of citation made in less than five years from that date, the plea of prescription interposed by the defendant must be overruled.

In conclusion, it is respectfully submitted that, upon consideration of the authorities and of the pleadings and proof in the cause, the decree of the Circuit Court should be reversed and avoided, and a decree be rendered recognizing and enforcing the rights of mortgage asserted by complainant against an undivided half of the real estate described in the pleadings, and holding the defendant personally liable to the complainant for the amount of the notes sued on, with interest as claimed, and costs.

HENRY B. KELLY,
HENRY L. LAZARUS,
of counsel.

Supreme Court of the United States.

No. ——

MRS. MARY C. GORDON, APPELLANT,

versus

JAMES H. GILFOIL, APPELLEE.

BRIEF OF APPELLEE.

Appeal from U. S. Circuit Court, Fifth Circuit, District of Louisiana.

In this cause the appellant, Mrs. Gordon, seeks to hold the defendant liable on four promissory notes executed by his father, Patrick Gilfoil, deceased, of the Parish of Madison, State of Louisiana. These notes were executed on the 17th January, 1867, and were secured by a mortgage on certain lands situated in the said Parish and described in plaintiff's bill. It should be noted at the outstart that the appellee in

this case was not a party to the notes or mortgage, but was a minor at the date of his father's death. The history, facts and merits of this case is told in the 27th Louisiana Annual Report, p. 265, which we insert, as follows:

"Under an order of seizure and sale against the property of the defendant at the suit of the plaintiff, sale of the tract of land now in controversy was made on the third day of July, 1869, the plaintiff becoming the purchaser. The defendant remained in possession. On the fifteenth of January, 1872, plaintiff brought this suit, setting up title under the sheriff's sale, and praying to be recognized as owner, and to recover the property.

"The defendant answered, setting up the nullity of all the proceedings under the order of seizure and sale, and averring that none of the forms of law were observed in making the sale, specifying several of the alleged informalities. J. H. Gilfoil, the son of the defendant, intervened, claiming one-half the land in right of his deceased mother, the land being community property between herself and the defendant. Pending this suit, it seems, defendant died, and the plaintiff filed a supplemental petition making the intervenor a party defendant as heir of his deceased father. The intervenor, answering this supplemental petition, pleads a general denial, and specially pleads the nullity of the proceedings under which the sale of the property is alleged by plaintiff to have been made by the sheriff; that the pretended sale is null as to him, who was no party to the proceedings.

"It is alleged that there was no notice of seizure given in the proceeding *via executiva* as the law requires, and that the sheriff's return of service of the notice is defective and illegal; that no legal and valid seizure of the property was made.

"We think the defendant has shown that the exception in regard to the seizure was well taken, and must prevail. The proof is, that the sheriff at no time had the mortgaged property in his possession, either under his personal control or under that of a keeper. The defendant, Patrick Gilfoil, remained, after this pretended seizure, in undisturbed possession of the premises, managing and controlling the place exclusive of everybody else. An actual corporeal possession of property seized must take in order to make a sheriff's seizure valid, and to render a compliance with the law complete. The sheriff must have the property in his own possession and under his own control, or in the possession and under the control of some person duly appointed and authorized by him. See the case of Corse vs. Stafford, 24 An. 262, and cases there cited.

"We regard the seizure in this case as a mere paper seizure, and the sheriff's sale as a nullity.

"It is therefore ordered that the judgment of the lower court, so far as it is rendered in favor of the plaintiff, be annulled and avoided; that the decree in favor of the intervenor be affirmed. It is now further ordered that there be judgment in favor of the defendant, the plaintiff paying costs in both courts.

"Rehearing refused."

Mrs. Mary C. Gilfoil vs. Patrick Gilfoil, James H. Gilfoil, Intervenor, 27 A. 265. See also Watson vs. Bondurant, 21 Wall. 123.

Our defence to this is: First, *res adjudicata*, and, secondly, the prescription of five years. R. C. C. 3540.

It appears (p. 17) that the land was acquired by Patrick Gilfoil from Jos. L. Haynes 19th April, 1848, during the marriage, and that Mrs. Catherine Gilfoil died 13th April, 1866, the year previous to the date of

the notes and mortgage; and also that Patrick Gilfoil died about October 2, 1872.

It also appears that the defendant, James H. Gilfoil was about nineteen years old at the time of his father's death, though since judicially emancipated, and that he is the sole heir of both parents, not unconditional, but with the benefit of inventory.

FIRST—OF PRESCRIPTION.

The exception of prescription was made in the State Court. The notes, one for $1750, and one for $527, both maturing 1st of January, 1868, one for $1750, and the fourth for $500, the two last maturing 1st of January, 1869, bearing the signature of J. P. Gilfoil, and by himself endorsed, bear no other name nor endorsement than that of the filing by the clerk of the court.

If this suit is upon the notes, then on their face they are prescribed, as to James H. Gilfoil, since the 1st of January, 1874.

If, as plaintiff's counsel claim, prescription was interrupted, as to Patrick Gilfoil, by the service of executory process in the first suit, on the 25th of March, 1869, it was not an interruption as to James H. Gilfoil.

The suit, or proceeding by executory process No. 572 (see p. 45), was terminated by the judgment or order thereon 9th of February, or the service of process on 25th of March. 1859, and if not then, was certainly terminated by the sale on the 3d of July, 1869, when the Sheriff closed his proceeding and returned

the writ of executory process; and those proceedings have not been since pending so as to *suspend* prescription, so at the very latest, on the 3d of July, 1874, the notes were prescribed, if not before, which we contend they had been as to this defendant.

We have carefully examined the cases quoted by opposing counsel, as to the interruption of prescription by the service of executory, an equivalent for citation, those contained in 4 A., 324; 6 A., 54; 8 A., 23; Walker vs. Lea, 20 A., 192. These cases show that it is only an *interrupting* and not a *suspending* of the prescription.

Being only an interruption on the 25th of March, 1869, prescription commenced to run again, and was complete on 25th March, 1874.

Service of the executory process, suit No. 572, was not a *suspending*, but only an *interruption* of prescription, because it was not litigated, and if any suspension was operated, and it could not have been longer than until the closing of the process by the adjudication on 3d July, 1869.

If the subsequent or second suit was upon the notes, then it and the present suit are identical, and the decision in that suit was *res adjudicata*. On the other hand, if suit No. 772 was not upon the notes, then there has been no action upon the notes since 3d of July, 1869, until the institution of the present suit, 18th of October, 1876. Adopting either of these two theories, the plaintiff is concluded by either one of the two exceptions.

SECOND—OF RES JUDICATA.

We contend that all the issues involved in the present suit were presented by the plaintiff against this same defendant in the suit No. 772, Thirteenth District Court, which suit although originally a possessory action (to assert possession under executory process, suit 572) was changed by the plaintiff's amendments and proceedings into a petitory action, and that all the grounds of action therein set forth stand adjudged in our favor.

In her supplemental and amended petition the plaintiff alleged—as is set forth in the appellants brief in the Lower Court:

"It further appears that after James H. Gilfoil had intervened in said suit, the defendant, Patrick Gilfoil, died, and that on the 4th day of April, 1874, Mrs. Gordon filed a supplemental petition in said suit, setting forth the death of Patrick Gilfoil, and that James H. Gilfoil was in possession of the property sued for, and had been in possession thereof ever since the death of said Patrick Gilfoil, and refused to surrender the same; that whatever succession was left by said Patrick Gilfoil at his death had been taken possession of by said James H. Gilfoil without any process of law, and used for his own purposes, whereby he rendered himself liable personally for all the debts of the succession; and it was prayed that James H. Gilfoil be made a party defendant, and that judgment be rendered against him as prayed for against Patrick Gilfoil in the original petition.

"To this supplemental petition James H. Gilfoil answered by a general denial, and a special denial that

any legal sale was ever made of said land, averring that the sale pretendedly made was illegal, null and void, because no notice of such order of seizure and sale was ever served on P. Gilfoil, and because there was no legal seizure advertisement or appraisement, and that the sale was null as to James H. Gilfoil, because he was no party to the proceedings."

It is the practice in Louisiana, that when a cause is put at issue on various questions, and a final judgment is had in the case, if the suit is then appealed to the Supreme Court, the decree of the appellate court is final and conclusive on every point presented in the pleadings, notwithstanding that the decision may have referred to only several of the questions presented, and have omitted a reference to the others; the decree is considered as entirely conclusive on all points, unless the Supreme Court has seen fit to annnounce a reservation, in which event, there always is in the degree an order to remand the case for consideration on such point or questions.

The plaintiff, Mrs. Gordon, cannot urge any technical distinction between the suit in the State Court and the present case. The issue made by her in the former case was the enforcement of her alleged mortgage right and the defendant's liability as an intermeddler for his father's debts.

To constitute *res judicata* the form of procedure is immaterial; when proper parties join issue before a competent court, even in an irregular proceeding, they must abide by the decision. Trescottt vs. Lewis, 12 A. 197.

A judgment has the force of *res judicata* as to all

matters and demands set up in the pleadings. Erwin vs. Bissell, 17 L. 92.

In the decree rendered and not in the opinion pronounced, will be found the thing adjudged. Keane vs. Fisher, 10 A. 261.

The plea of *res judicata* is to be decided by reference to matters put at issue by the pleadings. Saul vs. Creditors, 430; 16 A. 363.

The only remedy left to the plaintiff, if any, would have been an appeal from the decree of the Supreme Court of Louisiana, to the Supreme Court of the United States, and then only provided a Federal question had been involved.

The Court will search in vain through the record to find therein a line of evidence, or a particle of proof, that the defendant has intermeddled, or rendered himself liable for his father's debts; it is not shown that he has exercised even any conservatory acts (such as are spoken of in Act 994, C. C.) or had anything to do with the alleged interest claimed in the particular tract in question.

The plaintiff cannot obtain a judgment solely upon a mere allegation.

James Gilfoil having been a minor at the decease of his father, the law provides that he could not be an heir other than beneficiary. R. C. C. 977. "Minors are beneficiary heirs by operation of law."

One undivided half belonged to him as heir of his mother, and his only connection with the half interest left by his father is not as an individual but as administrator. The plaintiff has, in the absence of positive

proof of intermeddling, no remedy against him individually.

We therefore conclude—

1. That the Circuit Court is without jurisdiction of a suit to annul the decree of the Supreme Court of Louisiana.

2. That the parties having litigated the same issues, and a final judgment having been had, the suit must fall under the plea of *res judicata.*

3. That James H. Gilfoil, not being a party to the notes signed P. Gilfoil, thsre is no cause of action him on the notes

4. That any action on the notes is prescribed by the lapse of five years, from 25th March, or at latest, from 3d July, 1869.

5. That no action nan lie against defendant for the one-half of the 160 acres derived from his mother.

6. That no action can lie against him individually, for the claims against his father's succession, and that this action, not being against him in his capacity as administrator, cannot be maintained.

We ask that there be judgment in defendant's favor on all the foregoing pleas.

All which is respectfully submitted,

SAM'L R. WALKER,
Counsel for Defendant.